(11)

No. 01-800-CFX Title: Karen Howsam, etc., Petitioner
v.
Dean Witter Reynolds, Inc.

Docketed: December 3, 2001 Court: United States Court of Appeals for the Tenth Circuit

Entry	Date	Proceedings and Orders
	Nov 6 2001	Petition for writ of certiorari filed. (Response due January 2, 2002)
	Jan 2 2002	Brief of respondent Dean Witter Reynolds in opposition filed.
	Jan 7 2002	Request for an extension of time to file a brief in opposition denied.
	Jan 16 2002	DISTRIBUTED for Conference of February 15, 2002
	Feb 19 2002	REDISTRIBUTED for Conference of February 22, 2002
	Feb 25 2002	Petition GRANTED. Justice O'Connor OUT. SET FOR ARGUMENT October 9, 2002.
		**********
	Mar 26 2002	Order extending time to file the joint appendix and petitioners' brief on the merits to and including May 28, 2002.
	May 28 2002	Brief amicus curiae of Securities and Exchange Commission filed.
	May 28 2002	LODGING consisting of ten copies of an article by Barbara Black submitted by the Solicitor General.
	May 28 2002	Brief amici curiae of Trial Lawyers for Public Justice and AARP filed.
	May 28 2002	Joint appendix filed.
	May 28 2002	Brief of petitioner Karen Howsam filed.
	Jun 3 2002	Order extending time to file respondent's brief on the merits to and including July 22, 2002.
	Jul 22 2002	Motion of Competitive Enterprise Institute for leave to file a brief as amicus curiae filed.
	Jul 22 2002	Brief amicus curiae of Securities Industry Association filed.
	Jul 22 2002	Brief of respondent Dean Witter Reynolds Inc. filed.
	Jul 22 2002	LODGING consisting of twenty spiral bound copies of related material received from counsel for amicus Securities Industry Assn. and distributed.
	Jul 23 2002	CIRCULATED.
	Jul 31 2002	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Aug 14 2002	Record filed.
	Aug 16 2002	Application (02A148) to extend the time for filing the reply brief on the merits, submitted to Justice Breyer.
	Aug 21 2002	Application (02A148) granted by Justice Breyer extending the time to file until August 23, 2002.
	Aug 21 2002	Record filed.
	Aug 22 2002	Reply brief of petitioner Karen Howsam, etc. filed.
	Sep 6 2002	Motion of Competitive Enterprise Institute for leave to file a brief as amicus curiae GRANTED. Justice O'Connor OUT.

app

No. 01-800-CFX

Entry	Date	Proceedings and Orders
	Sep 6 2002	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. Justice O'Connor OUT.
	Oct 8 2002	LODGING consisting of twenty copies of related NASD provisions received from counsel for the respondents and distributed.
	Oct 9 2002	ARGUED.

Supreme Court, U.S.
01 800 NOV - 6 2001
OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

KAREN HOWSAM, individually and as Trustee for the E. Richard Howsam, Jr. Irrevocable Life Insurance Trust dated May 14, 1982,

Petitioner,

v.

DEAN WITTER REYNOLDS, INC., a Delaware corporation,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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60pp

QUESTION PRESENTED

The parties agreed to arbitrate "all controversies" between them arising out of the petitioner's securities accounts with respondent, including "the construction . . . of this or any other agreement between" them.

The question presented is whether a court or the arbitrators should decide if claims are eligible for arbitration under a self-regulatory organization's arbitration code provision that "[n]o dispute, claim, or controversy shall be eligible for submission to arbitration under this Code where six (6) years have elapsed from the occurrence or event giving rise to the act or dispute, claim or controversy."

THE PARTIES

The parties are all listed in the caption of this case. Petitioner is not a corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Karen Howsam, individually and as Trustee for the E. Richard Howsam, Jr. Irrevocable Life Insurance Trust dated May 14, 1982 ("Howsam"), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The district court's order (Walker, D.J.), dated June 28, 1999, granting petitioner's motion to dismiss for lack of subject matter jurisdiction is unpublished. It is reprinted for purposes of this petition in the Appendix ("App.") at App. 31-36. The judgment entered by the district court as a result of the June 28, 1999, order is reprinted at App. 37-38. The opinion of the court of appeals is published at 261 F.3d 956 and reprinted for purposes of this petition at App. 1-30.

STATEMENT OF JURISDICTION

The court of appeals' opinion and judgment was entered August 9, 2001. Petitioner did not petition for rehearing or for rehearing *en banc* prior to filing this petition. 10th Cir. R. 35.1(B). Pursuant to Sup. Ct. R. 13.1, this petition is filed within 90 days of entry of judgment.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND ARBITRATION CODE PROVISIONS INVOLVED IN THIS CASE

(1) The United States Federal Arbitration Act, 9 U.S.C. § 1, *et seq.*, specifically, § 2, provides,

> A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

(2) Section 10304 of the NASD Code of Arbitration Procedure, Time Limitation Upon Submission, provides:

> No dispute, claim, or controversy shall be eligible for submission to arbitration under this Code where six (6) years have elapsed from the occurrence or event giving rise to the act or dispute, claim or controversy. This Rule shall not extend applicable statutes of limitations, nor shall it apply to any case which is directed to arbitration by a court of competent jurisdiction.

(3) Section 10324 of the NASD Code of Arbitration Procedure, Interpretation of Provisions of Code and Enforcement of Arbitrator Rulings, provides:

> The arbitrators shall be empowered to interpret and determine the applicability of all provisions under this Code and to take appropriate action to obtain compliance with any ruling by the arbitrator(s). Such interpretations and actions to obtain compliance shall be final and binding upon the parties.

STATEMENT OF THE CASE

After her husband's death in 1986, Howsam opened securities accounts with Dean Witter Reynolds, Inc. ("DWR") for herself and for a family trust. DWR and its registered representative purchased a number of limited partnerships for the accounts at a total cost of about $550,000. The partnerships were represented to Howsam to be long term investments which would provide income and growth in value for five to ten year periods, after which either the partnerships would have sold their properties or Howsam would sell her partnership interests. Through March 1992, the partnerships were valued on monthly account statements at their purchase costs. After March 1992, the partnerships were not valued at all on the account statements, but DWR's registered representative repeatedly assured Howsam that they continued to be good and valuable investments.

In late 1994, Howsam began to receive correspondence from the partnerships alerting her to the fact that they had suffered serious losses in value since their purchases in 1986. Howsam subsequently closed the DWR accounts.

The DWR customer agreement Howsam signed in 1992 contained an arbitration clause, requiring her to arbitrate disputes with DWR. In March 1997, Howsam commenced arbitration by filing a statement of claim alleging breaches of fiduciary duties by DWR and its registered representatives with the National Association of Securities Dealers, Inc. ("NASD"). The breaches included failure to recommend and sell Howsam investments which were suited to her and the trust's investment objectives, failure to advise Howsam that the investments were or had become unsuitable for her and the trust, and failure to monitor the investments and to keep Howsam apprised of their value so that she could make informed decisions with respect to their sale or retention prior to late 1994.

In July 1997, DWR filed a complaint in the district court seeking declaratory relief and to enjoin the arbitration from proceeding. DWR asserted jurisdiction under 28 U.S.C. §§ 1332(a)(1), 1391(b), and 2201. DWR contended that the events giving rise to the arbitration claims occurred more than six years prior to the commencement of arbitration, thus making them ineligible for arbitration pursuant to NASD Code of Arbitration Procedure (the "Code") § 10304.[1]

---

[1] Effective July 1, 1996, the NASD initiated a new numbering system under which NASD Code § 15 was changed to NASD Code § 10304. The text of § 10304 is identical to the text of § 15, and, therefore, the case law interpreting § 15 applies equally to § 10304.

By order dated June 28, 1999, the district court granted Howsam's motion to dismiss DWR's complaint for lack of subject matter jurisdiction, holding that the eligibility issues presented by DWR's complaint must be determined by the arbitrators rather than the court. The district court found that the operative agreement to arbitrate was contained in an August 1992 Client Service Agreement (the "1992 Agreement") which provided, in relevant part,

> The Client agrees that all controversies between the Client and Dean Witter . . . concerning or arising from (i) any account maintained with Dean Witter by the Client; (ii) any transaction involving Dean Witter and the Client . . . ; or (iii) the construction, performance or breach of this or any other agreement between us . . . shall be determined by arbitration . . . .

The 1992 Agreement further provided that it was governed by the law of the State of New York. Relying on *Smith Barney Shearson Inc. v. Sacharow*, 689 N.E.2d 884 (N.Y. 1997), and *Cogswell v. Merrill Lynch, Pierce, Fenner & Smith*, 78 F.3d 474 (10th Cir. 1996), the district court determined that "the totality of this broad language [the arbitration provision of the 1992 Agreement] clearly and unmistakably evidences the parties' intention to have *all* disputed issues, including those of eligibility of arbitration pursuant to Section [10304], arbitrated and not judicially determined." App. 34 (emphasis in the original).

The court of appeals reversed, concluding that "the district court erred in finding that the parties 'clearly and unmistakably' agreed to allow an arbitrator, rather than

the courts, to decide whether specific disputes are arbitrable." App. 2.

In *Cogswell*, in which the Tenth Circuit had earlier held that courts rather than arbitrators should decide § 10304 eligibility issues, the court specifically stated that because the customer agreement was to be "construed in accordance with the laws of the State of New York," it applied New York's "principles of contract interpretation to determine the meaning of the agreement," *id.* at 478, citing *First Options of Chicago v. Kaplan*, 514 U.S. 938 (1995). After *Cogswell* was decided, the highest court in New York decided *Sacharow*, in which it held that an arbitration clause virtually identical to that contained in Howsam's 1992 Agreement clearly and unmistakably evidenced the parties' intent to submit § 10304 eligibility issues to the arbitrators.

The 1992 Agreement contained a provision that it was to be "construed and enforced in accordance with the laws of the State of New York." Nevertheless, the court of appeals rejected Howsam's contention that it should follow New York's construction of the arbitration clause, holding that the Federal Arbitration Act, 9 U.S.C. § 2, and related case law, created "a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." App. 20 (citation omitted).

The court of appeals recognized "that the circuit courts of appeals are almost evenly divided on the issue of whether the limitations period set forth in NASD Code

§ 10304 is a substantive eligibility requirement, or jurisdictional prerequisite to arbitration, which must be determined in the first instance by the courts." App. 28.

REASONS FOR GRANTING THE WRIT

I. The Court Should Resolve the Conflict Among the Circuits Over Whether the Courts or Arbitrators Determine Eligibility Under NASD Code § 10304 and Similar Provisions

The issue of whether courts or arbitrators should decide eligibility for arbitration under § 10304 of the NASD Code has been the subject of numerous conflicting rulings from various state and federal courts. Five federal circuits, including the Tenth Circuit, have determined that courts, not arbitrators, should decide the issue of § 10304 eligibility. *See, e.g., Painewebber, Inc. v. Hofmann*, 984 F.2d 1372 (3d Cir. 1993); *Dean Witter Reynolds, Inc. v. McCoy*, 995 F.2d 649 (6th Cir. 1993); *Edward D. Jones & Co. v. Sorrells*, 957 F.2d 509 (7th Cir. 1992); *Cogswell*; *Merrill Lynch, Pierce, Fenner & Smith v. Cohen*, 62 F.3d 381 (11th Cir. 1995).[2]

Five federal circuits have held to the contrary, holding that the decision is reserved for arbitrators. *See, e.g., Painewebber Inc. v. Elahi*, 87 F.3d 589 (1st Cir. 1996); *Paine-*

[2] *But see Dean Witter Reynolds, Inc. v. Fleury*, 138 F.3d 1339 (11th Cir. 1998) (upholding *Cohen*, but noting that in this case the broker's actions in filing responsive plea with arbitrators and arguing § 10304 issues with Director of Arbitration amounted to "clear and unmistakable evidence" of an intent to submit the issue to arbitration).

Webber Inc. v. Bybyk, 81 F.3d 1193 (2d Cir. 1996); *Smith Barney Shearson, Inc. v. Boone*, 47 F.3d 750 (5th Cir. 1995); *FSC Sec. Corp. v. Freel*, 14 F.3d 1310 (8th Cir. 1994); *O'Neel v. National Asso. of Sec. Dealers, Inc.*, 667 F.2d 804 (9th Cir. 1982).

State courts have similarly split on the question of whether courts or arbitrators should decide the question of § 10304 eligibility. *Accord, Cigna Fin. Advisors v. Rosen*, No. CV 94 0705235 (Conn. Super. Ct. Jan. 9, 1995), 1995 Conn. Super. LEXIS 74 (holding that courts decide eligibility question); *Citibank v. Crowell, Weedon & Co.*, 4 Cal. App. 4th 844 (Cal. App. 1992) (construing identical language in MSRB Arb. Code, rule G-35, Sec. 6, holding courts decide); *but see, Smith Barney, Inc. v. Keeney*, 570 N.W.2d 75 (Iowa 1997) (holding § 10304 issue is for arbitrators to determine); *Shahan v. Staley*, 188 Ariz. 74, 932 P.2d 1345 (Ariz. App. 1996) (to same effect).

To complicate matters further, the courts deciding these cases have reached their decisions using conflicting lines of reasoning. *Cf. Boone*, 47 F.3d at 753-54 (holding that § 10304 eligibility is arbitrability question, but is one of procedural rather than substantive arbitrability, thus determinable by the arbitrators), and *Elahi*, 87 F.3d at 599 (holding that § 10304 eligibility is presumptively not an arbitrability issue, unless parties clearly and unmistakably express an intent to make it thus). *Cf. also Freel*, 14 F.3d 1310 (basing its holding on the fact that § 10324[3]

[3] Pursuant to the July 1, 1996, new numbering system initiated by the NASD, NASD Code § 35 was changed to NASD Code § 10324. The text of § 10324 is identical to the text of § 35, and, therefore, the case law interpreting § 35 applies equally to § 10324.

unambiguously grants arbitrators power to decide all issues under code), and *Bybyk*, 81 F.3d 1193 (basing its holding on contract interpretation principles which call for courts to construe an ambiguous provision against the drafter).

II. Mandating Court Determination of § 10304 Eligibility Does Not Accord With Prior Holdings of This Court and Imposes a Wasteful Layer of Litigation on the Arbitration Process

This Court, in *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 649, 106 S. Ct. 1415, 1418-19 (1986) held that:

> the question of arbitrability – whether [an] . . . agreement creates a duty for the parties to arbitrate the particular grievance – is undeniably an issue for judicial determination. *Unless the parties clearly and unmistakably provide otherwise*, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator.

Emphasis added.

In *Volt Information Sciences, Inc. v. Board of Trustees*, 489 U.S. 468, 109 S. Ct. 1248 (1989), this Court confirmed the principles that: (1) state, not federal, law generally governs construction of arbitration agreements under the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.* ("FAA"); (2) the FAA does not preempt the entire area of arbitration but only requires that arbitration proceed in the manner agreed to by the parties, including, where applicable, the parties' choice of state arbitration law; and (3) although ambiguities in arbitration agreements must be resolved in

favor of arbitration, the parties' intentions control and the courts' function is to enforce private arbitration agreements.

In *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57, 115 S. Ct. 1212, 1216 (1995), this Court reaffirmed its prior holding in *Volt* that under the FAA, arbitration agreements must be enforced according to their terms, even if such terms call for application of state arbitration law and that judicial construction of contracts is a matter of state law. In that same vein, this Court, in *First Options*, 514 U.S. 938 (1995), again affirmed the principle that arbitration agreements should generally be construed in accordance with state law principles of contract construction. "Arbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit." *Volt*, 489 U.S. at 479, 109 S. Ct. at 1256.

As a typical brokerage firm customer signing a typical pre-printed form brokerage firm agreement, Howsam agreed to arbitrate all claims and disputes arising out of the handling of her accounts by DWR. There is no dispute that Howsam's claims arise out of transactions in her accounts. There is a dispute over whether all or part of her claims are ineligible for arbitration before the NASD by virtue of § 10304 of its arbitration code.

Because the claims and disputes undeniably arise out of securities transactions in Howsam's account, they are arbitrable. Application of § 10304 is no different from application of statutes of limitation or statutes of repose, which courts have long held are appropriate matters for determination by arbitrators. Moreover, § 10324 grants

NASD arbitrators the power "to interpret and determine the applicability of all provisions under this Code . . . ."

Even if the parties had not expressly agreed to arbitrate such issues, the time considerations in § 10304 present issues of "procedural arbitrability" and are thus for the arbitrators to decide in accordance with this Court's holding in *John Wiley & Sons v. Livingston*, 376 U.S. 543, 84 S. Ct. 909 (1964).

The securities industry successfully advocated the right of brokers to compel customers who signed customer agreements containing arbitration clauses to arbitrate. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 105 S. Ct. 1238 (1985); *Shearson/American Express v. McMahon*, 482 U.S. 220, 107 S. Ct. 2332 (1987); *Rodriguez de Quijas v. Shearson/American Express*, 490 U.S. 477, 109 S. Ct. 1917 (1989). As in Howsam's case, the arbitrations are conducted by industry-run self-regulatory organizations and exchanges.

Paradoxically, DWR and other brokerage firms now, in cases like Howsam's, frequently go to court to enjoin the arbitrations they have imposed on their customers. As the *Sacharow* court observed,

> Lastly, it would be ironic and anomalous to permit parties from the securities industry, who generally derive benefits from the arbitration method they impose on their thousands of consumers, to elude the comprehensive language of their own industry-drafted arbitration agreements. Having agreed to plenary arbitration, they should not garner that strategic advantage

> against their aggrieved or dissatisfied customers.

Id., 689 N.E.2d at 889.

Benefits of arbitration presumably include more efficient and less costly resolution of disputes. By seeking judicial determination of when "the occurrence or event giving rise to the act or dispute, claim or controversy" first occurred for purposes of applying § 10304, DWR and other brokers force their customers into court as defendants in order to delay arbitration and to increase the costs of bringing claims. Howsam asks this Court to draw a distinction between determination of whether a claim falls within the scope of controversies parties have agreed to arbitrate and determination of whether a claim is barred in whole or in part by § 10304 and similar arbitration rules. Determination of arbitrability is for the courts. Application of the six year rule contained in § 10304 should be for the arbitrators appointed to apply the NASD's Code to the controversies presented to them for resolution.

III. The Court of Appeals Disregarded This Court's Instructions By Refusing to Apply State Law In Construing the Parties' Arbitration Agreement

This Court has held that the ultimate question of arbitrability is based on the parties' intent, and that included in that intent may be a choice of law provision. "Arbitration under the [Federal Arbitration] Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit."

Volt, 489 U.S. at 479, 109 S. Ct. at 1256. Arbitration agreements must be enforced according to their terms, even if such terms call for application of state arbitration law. Judicial construction of contracts is a matter of state law. *Mastrobuono*, 514 U.S. at 57, 115 S. Ct. at 1216:

> This Court has confirmed the principles that: (1) state, not federal, law generally governs construction of arbitration agreements under the FAA; (2) the FAA does not preempt the entire area of arbitration but only requires that arbitration proceed in the manner agreed to by the parties, including, where applicable, the parties' choice of state arbitration law; and (3) although ambiguities in arbitration agreements must be resolved in favor of arbitration, the parties' intentions control and the courts' function is to enforce private arbitration agreements. *Volt*.

The 1992 Agreement provided that New York law applied. The customer agreement in *Cogswell* also contained a provision that it was to be construed in accordance with the laws of the State of New York. The Tenth Circuit followed the principles enunciated in *First Options* in its decision in *Cogswell* by expressly applying New York law as it existed before *Sacharow* was decided. In *Sacharow*, New York's highest court construed language virtually the same as that found in the 1992 Agreement, as clearly and unmistakenly expressing the parties' intent that the arbitrators decide whether claims are eligible for arbitration under § 10304. In this case, however, the court of appeals declined to apply New York's construction of the contract language, instead announcing that it was applying the "federal substantive law of arbitrability."

The Court should issue a writ of certiorari to determine whether the Tenth Circuit erred in applying its own interpretation in *Cogswell* to the facts of this case and in not applying the applicable New York state law of contract construction.

CONCLUSION

A writ of certiorari should issue to address the issues of law discussed above.

Dated: Denver, Colorado

November 6, 2001

Respectfully submitted,

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PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

DEAN WITTER REYNOLDS, INC., a Delaware Corporation, Plaintiff-Appellant,	)	
v.	)	No. 99-1320
KAREN HOWSAM, individually, and as Trustee for the E. Richard Howsam, Jr., Irrevocable Life Insurance Trust dated May 14, 1982, Defendant-Appellee.	)	(Filed Aug. 9, 2001)

Appeal from the United States District Court for the District of Colorado (D.C. No. 97-WM-1463)

Bradford D. Kaufman, Greenberg Traurig, P.A. (Joseph C. Coates, Greenberg Traurig, P.A., and Martin D. Litt, Holme Roberts & Owen LLP, with him on the briefs), West Palm Beach, Florida, for Plaintiff-Appellant.

Alan C. Friedberg, Pendleton, Friedberg, Wilson & Hennessey, P.C., Denver, Colorado, for Defendant-Appellee.

Before **EBEL** and **LUCERO**, Circuit Judges, and **VRATIL**,* District Judge.

EBEL, Circuit Judge.

Plaintiff-Appellant Dean Witter Reynolds, Inc. brought this action seeking to enjoin Respondent-Appellee Karen Howsam from arbitrating a dispute between Dean Witter and Howsam with the National Association of Securities Dealers ("NASD") on the ground that the dispute was time-barred under NASD rules. The district court concluded that the parties, in a 1992 ACCESS Client Service Agreement, had "clearly and unmistakably" agreed that all disputes between the parties, including questions regarding the arbitrability of those disputes, would be determined by an arbitrator rather than by the courts. The district court thus dismissed Dean Witter's cause of action. Exercising jurisdiction pursuant to 28 U.S.C. § 1291, we conclude that the district court erred in finding that the parties "clearly and unmistakably" agreed to allow an arbitrator, rather than the courts, to decide whether specific disputes are arbitrable. We therefore REVERSE the decision of the district court and REMAND for further proceedings.

---

* The Honorable Kathryn H. Vratil, United States District Judge for the District of Kansas, sitting by designation.

BACKGROUND

Karen Howsam ("Howsam") was a customer of Dean Witter Reynolds, Inc. ("Dean Witter") in March and April 1986, at which time she was advised by Dean Witter, through two of its brokers, Robert P. Howard and Paul J. Siler, to invest in a total of four limited partnerships. Howsam remained invested in those limited partnerships, allegedly due to the ongoing advice of Dean Witter, until late 1994, at which point she closed her Dean Witter accounts and moved her funds to another investment firm.

During the period when Howsam was a customer of Dean Witter, Howsam entered into a standard ACCESS Client Service Agreement ("1992 ACCESS Agreement"). The 1992 ACCESS Agreement, which was drafted by Dean Witter and signed by both Howsam and a Dean Witter representative, stated:

> The Client agrees that all controversies between the Client and Dean Witter and/or any of its officers, directors, or employees, present or former, concerning or arising from (i) any account maintained with Dean Witter by Client; (ii) any transaction involving Dean Witter and Client, whether or not such transaction occurred in such account or accounts; or (iii) the construction, performance or breach of this or any other agreement between us, whether such controversy arose prior to, on or subsequent to the date hereof, shall be determined by arbitration before any self-regulatory organization or exchange of which Dean Witter is a member. The Client may elect which of these arbitration forums shall hear the matter. . . .

Additionally, the 1992 ACCESS Agreement contained a provision specifying that the Agreement would be construed and enforced in accordance with New York state law "without reference to choice of law doctrine."

Pursuant to the terms of the 1992 ACCESS Agreement, on March 7, 1997, Howsam commenced an arbitration proceeding before the NASD regarding Dean Witter's recommendation that she invest in the four limited partnerships. Howsam filed an amended arbitration claim on April 10, 1997. In the amended claim, Howsam alleged that Dean Witter, through its agents Howard and Siler, made material misrepresentations about the investments prior to her decision to purchase them, and that the investments were unsuitable for someone with her investment needs. Howsam further alleged that Dean Witter, again through its agents, continued to inform her that the investments were sound, despite indications to the contrary, which impeded her understanding of the true nature of the investments until late 1994.

In order to commence the arbitration before the NASD, Howsam executed a Uniform Submission Agreement ("1997 Submission Agreement"), as required by the NASD. The 1997 Submission Agreement stated that Howsam agreed to submit her claims to the NASD with the understanding that the arbitration would be conducted in accordance with the rules and provisions of the NASD. Specifically, the 1997 Submission Agreement stated:

> 1. The undersigned parties hereby submit the present matter in controversy, as set forth in the attached statement of claim, . . . to arbitration in accordance with the Constitution, By-Laws, Rules, Regulations, and/or Code of Arbitration Procedure of the sponsoring organization.

The 1997 Submission Agreement contained another provision asserting, "The undersigned parties hereby state that they have read the procedures and rules of the sponsoring organization relating to arbitration." Although only Howsam signed the 1997 Submission Agreement, Dean Witter had effectively agreed to the 1997 Submission Agreement when, in the 1992 ACCESS Agreement, it gave Howsam the power to select the particular arbitration forum that would hear any dispute arising between the parties.

The NASD Code of Arbitration Procedure ("NASD Code") contains a provision stating that "[n]o dispute, claim or controversy shall be eligible for submission to arbitration under this Code where six (6) years have elapsed from the occurrence or event giving rise to the act or dispute, claim or controversy." *See* NASD Code § 10304 (formerly NASD Code § 15).[1] Based upon this provision in the NASD Code, Dean Witter (and co-defendant Howard, who was later dismissed from the lawsuit[2]) filed a

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[1] For purposes of clarity, we consistently refer to this provision by its current section number, "NASD Code § 10304," but note that several cases cited in this opinion refer to the provision by its prior section number, "NASD Code § 15."

[2] Dean Witter and Howard asserted diversity jurisdiction for purposes of establishing subject matter jurisdiction in the federal courts. Dean Witter was subsequently forced to dismiss Howard from the action in order to maintain complete diversity. The record does not indicate why Paul Siler, the other broker against whom Howsam brought claims in the NASD arbitration, was not a party to Dean Witter's federal lawsuit.

complaint in the United States District Court for the District of Colorado, requesting declaratory relief in the form of a court determination that Howsam's claims were untimely and thus non-arbitrable by the NASD, as well as an order enjoining the NASD arbitration proceeding pending resolution of Dean Witter's claim. Dean Witter asserted that the question of arbitrability of Howsam's claims was for the court, and not for NASD arbitrators, to decide.

In response, Howsam filed a "Motion to Dismiss for Lack of Jurisdiction" ("Motion"). In the Motion, Howsam argued that the district court lacked jurisdiction to decide the issue of arbitrability because the parties, in the form of the 1992 ACCESS Agreement, had agreed that all issues concerning or arising from Dean Witter's account-related services would be submitted to arbitration. Additionally, Howsam argued that the 1992 ACCESS Agreement's choice of law provision, which specified that New York state law would govern any dispute between the parties, required that NASD arbitrators, and not the district court, determine whether Howsam's claims were arbitrable because a claim's arbitrability under § 10304 of the NASD Code is a question reserved for arbitrators under New York state law.

Dean Witter countered by arguing that, because Howsam had not contested Dean Witter's asserted basis for subject matter jurisdiction (*i.e.*, diversity of citizenship), her Motion arguing that the court lacked jurisdiction and that the complaint should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(1) was effectively a motion to dismiss for failure to state a claim under Rule

12(b)(6). Because the Motion was more properly characterized as a motion to dismiss under Rule 12(b)(6), Dean Witter argued, the district court should not consider the 1992 ACCESS Agreement because it was not attached to or referenced in Dean Witter's complaint. Dean Witter further argued that, even if the court were to look to the 1992 ACCESS Agreement, it did not provide "clear and unmistakable" evidence that the parties agreed to submit the question of arbitrability to the chosen arbitration organization.

The district court granted Howsam's Motion on June 28, 1999. The district court analyzed the language of the 1992 ACCESS Agreement (without referencing the 1997 Submission Agreement) and concluded that its language provided "clear and unmistakable" evidence that the parties intended to submit all issues, including the issue of arbitrability, to the chosen arbitration body. *See Dean Witter Reynolds, Inc. v. Howsam*, No. 97-WM-1463, slip op. at 2-4 (D. Colo. June 28, 1999).

On appeal, Dean Witter argues, first, that the district court erred in looking to the 1992 ACCESS Agreement because Howsam's motion was, in effect, a motion to dismiss pursuant to Rule 12(b)(6) and, since Dean Witter never referenced the 1992 ACCESS Agreement in its complaint, the 1992 ACCESS Agreement was not properly before the court. Second, Dean Witter argues that, regardless of whether the 1992 ACCESS Agreement could potentially be reviewed by the court, that agreement was superceded by the 1997 Submission Agreement and thus was no longer the controlling agreement between the parties. Third, Dean Witter asserts that, even if we find the district court's review of the 1992 ACCESS Agreement

appropriate, that agreement does not "clearly and unmistakably" demonstrate that the parties agreed to have the question of arbitrability of any given dispute decided by an arbitrator rather than the courts.

DISCUSSION

1. Standard of Review

We have stated, "Because it is based on contract interpretation, arbitrability is a legal question . . . [that] we review de novo." *Cogswell v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 78 F.3d 474, 476 (10th Cir. 1996). District court determinations regarding subject matter jurisdiction are reviewed de novo. *See Hart v. Dep't of Labor ex rel. United States*, 116 F.3d 1338, 1339 (10th Cir. 1997). Because this appeal arises from a motion to dismiss, we accept all well-pleaded factual allegations in the complaint as true, and view them in the light most favorable to the non-moving party. *See Prager v. LaFaver*, 180 F.3d 1185, 1187 n.1 (10th Cir. 1999).

2. Analysis

a. The district court properly reviewed the 1992 ACCESS Agreement when deciding Howsam's motion to dismiss

Dean Witter argues that the district court erred in treating Howsam's Motion as a 12(b)(1) motion rather than a Rule 12(b)(6) motion. That distinction is important because the district court looked outside the confines of Dean Witter's complaint, *i.e.*, to the 1992 ACCESS Agreement, when deciding Howsam's Motion, and generally

courts should not look beyond the confines of the complaint itself when deciding a Rule 12(b)(6) motion to dismiss. Without deciding whether the district court erred in treating Howsam's motion as a Rule 12(b)(1) motion to dismiss for lack of jurisdiction, we hold that even if the district court had treated Howsam's Motion as a Rule 12(b)(6) motion to dismiss for failure to state a claim it still could have properly considered the language of the 1992 ACCESS Agreement. Therefore, any error that may have occurred when the district court characterized Howsam's motion as a Rule 12(b)(1) motion is harmless to this case.

It is permissible for a court to look beyond the four corners of the complaint when deciding a Rule 12(b)(1) motion to dismiss, *see Pringle v. United States*, 208 F.3d 1220, 1222 (10th Cir. 2000), but it is generally unacceptable for a court to do so when deciding a Rule 12(b)(6) motion to dismiss, *see Jackson v. Integra, Inc.*, 952 F.2d 1260, 1261 (10th Cir. 1991) (stating that a court "must examine only the plaintiff's complaint . . . [and] cannot review matters outside of the complaint" when deciding a Rule 12(b)(6) motion). If the court on a Rule 12(b)(6) motion looks to matters outside the complaint, the court generally must convert the Rule 12(b)(6) motion into a Rule 56 motion for summary judgment. *See* Fed. R. Civ. P. 12(c) ("If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in [Federal Rule of Civil Procedure] 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.").

It is debatable whether the district court erred in deciding Howsam's Motion under Rule 12(b)(1) rather than Rule 12(b)(6). We need not resolve that issue in this case, however, because the district court was justified in looking to the 1992 ACCESS Agreement in any event. It is accepted practice that, "if a plaintiff does not incorporate by reference or attach a document to its complaint, but the document is referred to in the complaint and is central to the plaintiff's claim, a defendant may submit an indisputably authentic copy to the court to be considered on a motion to dismiss." *GFF Corp. v. Associated Wholesale Grocers*, 130 F.3d 1381, 1384 (10th Cir. 1997); *see also Brooks v. Blue Cross & Blue Shield of Fla.*, 116 F.3d 1364, 1369 (11th Cir. 1997) ("[W]here the plaintiff refers to certain documents in the complaint and those documents are central to the plaintiff's claim, . . . the Court may consider the documents part of the pleadings for purposes of Rule 12(b)(6) dismissal, and the defendant's attaching such documents to the motion to dismiss will not require conversion of the motion into a motion for summary judgment.") (citing *Venture Assoc. Corp. v. Zenith Data Sys. Corp.*, 987 F.2d 429, 431 (7th Cir. 1993)). "If the rule were otherwise, a plaintiff with a deficient claim could survive a motion to dismiss simply by not attaching a dispositive document upon which the plaintiff relied." *See GFF*, 130 F.3d at 1385.

Dean Witter asserts that it did not reference the 1992 ACCESS Agreement in its complaint. We disagree. In its complaint, Dean Witter stated: "Dean Witter and Defendants are parties to an *arbitration agreement*. Consistent with *that agreement*, Defendants filed their Arbitration with the NASD." The parties have presented only two

arbitration agreements in this case: the 1992 ACCESS Agreement and the 1997 Submission Agreement. Thus, the reference by Dean Witter to an "arbitration agreement" must be to the 1992 ACCESS Agreement. The decision to commence arbitration before the NASD was "consistent" only with that agreement, which required Howsam to submit "all controversies" to arbitration by the NASD or another arbitration body of which Dean Witter was a member. The 1997 Submission Agreement, on the other hand, was part of the submission of Howsam's claims to the NASD and it would make little sense for Dean Witter to allege that the act of submitting the 1997 Submission Agreement was "consistent with" itself. In addition, the 1997 Submission Agreement is referenced by another name in the following paragraph. (*See* Complaint ¶ 9 ("At the time Defendants filed their Original Statement of Claim with the NASD, they *also* signed a *Uniform Submission Agreement*. . . . ") (emphasis added).) We therefore find that Dean Witter did reference the 1992 ACCESS Agreement, albeit minimally, in their initial filing with the district court.

The 1992 ACCESS Agreement was the arbitration agreement pursuant to which Howsam was obligated to submit her claims to binding arbitration by the NASD (or another arbitration association of which Dean Witter was a member), and was therefore clearly central – nigh indispensable – to deciding the parties' claims. Accordingly, Howsam brought the 1992 ACCESS Agreement to the district court's attention by discussing it in, and attaching it to, her motion to dismiss. Dean Witter has never argued that the copy of the 1992 ACCESS Agreement attached to Howsam's Motion was not a true and complete copy of

the original arbitration agreement between the parties. Under these circumstances, we think it would have defied common sense for the district court to ignore the 1992 ACCESS Agreement when rendering its decision in this case. *Cf. GFF*, 130 F.3d at 1385.

For the foregoing reasons, we find the district court's review of the 1992 ACCESS Agreement appropriate in this case, regardless of whether Howsam's motion was considered under Rule 12(b)(1) or Rule 12(b)(6).

b. The 1992 ACCESS Agreement, as supplemented by the 1997 Submission Agreement, is the operative agreement between the parties.

We are next asked to decide which is the operative arbitration agreement in this case, the 1992 ACCESS Agreement or the 1997 Submission Agreement. We find that the 1992 ACCESS Agreement, as supplemented by the 1997 Submission Agreement, is the controlling arbitration contract between the parties.

Dean Witter has argued that the 1997 Submission Agreement superceded the 1992 ACCESS Agreement, or, in the alternative, that the 1997 Submission Agreement modified the 1992 ACCESS Agreement, and thus that the district court erred in analyzing only the 1992 ACCESS Agreement when deciding Howsam's motion to dismiss. Dean Witter offers no convincing case law, however, to support its proposition that the 1997 Submission Agreement *superceded* the 1992 ACCESS Agreement. Instead, the cases cited by Dean Witter stand for the proposition that contract terms contained in an earlier arbitration agreement may be *supplemented* by later submission

agreements signed by the parties. *See, e.g., Executone Info. Sys., Inc. v. Davis*, 26 F.3d 1314, 1323 (5th Cir. 1994) ("It is well settled that the arbitrator's jurisdiction is defined by *both* the contract containing the arbitration clause and the submission agreement. If the parties go beyond their promise to arbitrate and actually submit an issue to the arbitrator, we look both to the contract *and* to the scope of the submissions to the arbitrator to determine the arbitrator's authority." (citations omitted) (emphasis added)); *Piggly Wiggly Operators' Warehouse, Inc. v. Piggly Wiggly Operators' Warehouse Indep. Truck Drivers' Union Local No. 1*, 611 F.2d 580, 583 (5th Cir. 1980) ("Before arbitration can actually proceed, it is necessary for the parties to *supplement* the agreement to arbitrate by defining the issue to be submitted to the arbitrator and by explicitly giving him authority to act." (emphasis added)).

When analyzing the parties' intent regarding the scope of the proposed arbitration, we must therefore look both to the original arbitration agreement, in which the parties have generally agreed to arbitrate issues arising from their association, and to the submission agreement, in which the issues to be arbitrated are precisely defined. This is the case so long as there is no express contradiction between the initial arbitration agreement and the submission agreement. *Cf. United Food and Commercial Workers, Local Union No. 7R v. Safeway Stores*, 889 F.2d 940, 946 (10th Cir. 1989) ("Extension of the arbitrator's authority through submissions is only allowed to the extent that the submission does not violate an express provision of the collective bargaining agreement.").

The extent to which an arbitration submission agreement may supplement an earlier, general agreement to

arbitrate was implicitly acknowledged in *Cogswell v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 78 F.3d 474 (10th Cir. 1996). The issue of which agreement controlled, *i.e.*, the earlier arbitration agreement signed by both parties or the later submission agreement signed only by the plaintiff, was not squarely addressed by the *Cogswell* court, presumably because the parties in *Cogswell* "agree[d] [that] their arbitration agreement incorporates the NASD Code, and that the agreement is to be 'construed in accordance with the laws of the State of New York.' " 78 F.3d at 478. Nevertheless, the *Cogswell* court's reliance on the initial arbitration agreement is evidenced by its recognition of the choice of law provision, which was contained only in the initial arbitration agreement entered into by both parties.[3] *See id.* at 475. Further, the *Cogswell* court's reliance on the subsequently filed submission agreement is evidenced by its statement that the parties' agreement incorporated the NASD Code, which was not referenced in the initial agreement but was specifically identified as the governing "Code of Arbitration" in the arbitration submission agreement signed by the plaintiff. *See id.* The court thus recognized that the earlier arbitration agreement had been supplemented by the submission agreement, at least to the extent that it identified the rules and regulations by which the plaintiff, through her election of the NASD as the arbitral body, agreed to be bound. Accordingly, we read *Cogswell* as recognizing that an arbitration submission agreement

[3] It is thus clear that the *Cogswell* court did not view the arbitration submission agreement as having *superceded* the previous signed arbitration agreement between the parties, as Dean Witter argues in this case.

may supplement a prior arbitration agreement entered into by the parties, even without evidence that the non-submitting party agreed to the express terms of the submission agreement, when the non-submitting party had earlier given authority to the submitting party to choose an arbitration forum, as well as that forum's rules and regulations, from among a list of approved arbitration organizations.

In this case, Howsam agreed in the 1992 ACCESS Agreement to choose an arbitration forum from a list of approved organizations should she choose to bring a claim against Dean Witter. In filing the 1997 Submission Agreement, Howsam elected to have her claims resolved by the NASD pursuant to NASD rules and regulations. Specifically, in signing the 1997 Submission Agreement, Howsam agreed to "submit the present matter in controversy, as set forth in the attached statement of claim, . . . to arbitration in accordance with the Constitution, By-Laws, Rules, Regulations, and/or Code of Arbitration Procedure of the sponsoring organization." There is no contradiction between the 1992 ACCESS Agreement and the 1997 Submission Agreement, such that the latter can plausibly be seen to supplement the former. *Cf. United Food*, 889 F.2d 940 at 947. We therefore conclude that both the 1992 ACCESS Agreement and the 1997 Submission Agreement apply in this case.

c. The 1992 ACCESS Agreement, as supplemented by the 1997 Submission Agreement, does not "clearly and unmistakably" demonstrate the parties' intent to have issues of arbitrability decided by an arbitrator rather than by the courts

1) Agreement must provide clear and unmistakable evidence of the parties' intent

The Supreme Court has stated that "arbitration is a matter of contract," and thus that parties should not be forced to arbitrate issues that have not been agreed upon. *See AT&T Tech., Inc. v. Communications Workers of Am.*, 475 U.S. 643, 648 (1986) (interpreting an arbitration clause contained in a collective bargaining agreement). The Court has further stated that "[u]nless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate [a particular claim] is to be decided by the court, not the arbitrator." *Id.* at 649 (remanding the case to the district court to decide whether the collective bargaining agreement allowed arbitration of a particular labor dispute).

The Supreme Court explained the applicable standards in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), where it held that "[j]ust as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute, so the question 'who has the primary power to decide arbitrability' turns upon what the parties agreed about that matter." 514 U.S. at 943 (citations omitted). The *First Options* Court also noted, however, the particular difficulty in allowing arbitrators to decide the scope of their own jurisdiction:

> [T]he "who (primarily) should decide arbitrability" question . . . is rather arcane. A party often might not focus upon that question or upon the significance of having the arbitrators decide the scope of their own powers. And, given the principle that a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration, one can understand why courts might hesitate to interpret silence or ambiguity on the "who should decide arbitrability" point as giving the arbitrators that power, for doing so might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide.

Id. at 945 (citations omitted). Accordingly, the Court imposed a stringent test for the courts to apply in cases where the parties disagree over who should decide the arbitrability issue. Specifically, the Court stated: "Courts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so." *Id.* at 944 (citing *AT&T*, 475 U.S. at 649) (alteration in original).

We adopted this standard in *Cogswell*, where we were asked to decide whether the district court or an arbitrator should determine whether an arbitration claim is barred under the time limit contained in NASD Code § 10304. *See* 78 F.3d at 476. The plaintiff in *Cogswell* commenced an arbitration proceeding with the NASD and then filed a motion to compel arbitration in the United States District Court for the District of Colorado. *See id.* at 475. In ruling on the plaintiff's motion, the district court concluded that the arbitrators, and not courts, should determine whether the limitations period set forth in NASD Code § 10304 bars an arbitration claim. *Id.* at 475-76.

On appeal we reversed, noting that courts in other jurisdictions were "sharply divided" on the issue, but that the majority of courts had concluded that courts, and not arbitrators, should determine whether an action is time-barred by the NASD Code because that determination involves the scope of the arbitrator's "subject matter jurisdiction." *See id.* at 476-77. After discussing the holdings of courts reaching a contrary conclusion, as well as the Supreme Court's recent decision in *First Options*, the *Cogswell* court adopted the majority view that the courts, and not arbitrators, should determine the arbitrability under NASD Code § 10304 of disputes submitted to arbitration, absent a "clear and unmistakable" agreement to the contrary. *See id.* at 481; *see also, e.g., Oil, Chemical, & Atomic Workers Int'l Union v. Conoco, Inc.*, 241 F.3d 1299, 1304 (10th Cir. 2001); *Riley Mfg. Co., Inc. v. Anchor Glass Container Corp.*, 157 F.3d 775, 779 (10th Cir. 1998).

In analyzing the specific language at issue in *Cogswell*, the court determined that the NASD Code provision at issue, stating that "[n]o dispute, claim or controversy shall be eligible for submission to arbitration under this Code where six (6) years have elapsed from the occurrence or event giving rise to the act or dispute, claim, or controversy," *see* NASD Code § 10304, " 'can reasonably be read in only one way – as a substantive limit on the claims that the parties have contracted to submit to arbitration.' " *See Cogswell*, 78 F.3d at 479 (quoting *PaineWebber, Inc. v. Hofmann*, 984 F.2d 1372, 1379 (3d. Cir. 1993)). We thus concluded that a reading of NASD Code § 10304 simply could not provide the type of "clear

and convincing" evidence that is required to allow arbitrators to decide the arbitrability of the parties' dispute.[4] *See id.* at 480-81. Based upon this finding, we concluded in *Cogswell* that "[§ 10304] of the NASD Code defines the arbitrators' substantive jurisdiction and [thus] that the courts, not the arbitrators themselves, must decide whether a claim is time-barred under that provision." *Id.* at 481.

2) New York State law does not govern the arbitrability issue

Howsam argues that this court's decision in *Cogswell* is not controlling because the 1992 ACCESS Agreement contains a provision specifying that New York state law governs any dispute between the parties, "without reference to choice of law doctrine." Howsam notes that, after the *Cogswell* decision was handed down on February 23, 1996, the New York Court of Appeals decided *Smith Barney Shearson, Inc. v. Sacharow*, 689 N.E.2d 884 (N.Y. 1997), in which it found that an arbitration agreement, which was substantially similar to the agreements at issue in this case, provided "clear and unmistakable" evidence that the parties intended to have the issue of

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[4] We also concluded that NASD Code § 10324 (formerly NASD Code § 35), which states that "arbitrators shall be empowered to interpret and determine the applicability of all provisions under [the NASD Code]," *see* NASD Code § 10324, did not provide "clear and unmistakable" evidence that the question of arbitrability should be decided by arbitrators rather than the courts. *See Cogswell*, 78 F.3d at 480-81.

arbitrability under NASD Code § 10304 decided by an arbitrator rather than the courts.[5]

Howsam is incorrect that the choice of law provision in the parties' 1992 ACCESS Agreement mandates that we follow New York state law rather [than] our own precedent. The Federal Arbitration Act, 9 U.S.C. §§ 1-16, which applies to all arbitration agreements "involving commerce," 9 U.S.C. § 2, "create[s] a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). "Federal law in the terms of the Arbitration Act governs that issue in either state or federal court." *Id.* As

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[5] In *Sacharow*, New York's highest court reviewed an arbitration agreement which stated that " '[a]ny controversy . . . shall be settled by arbitration' in accordance with the rules of the NASD Code," and which provided that all disputes would be governed by New York law. *See* 689 N.E.2d at 885. The *Sacharow* court acknowledged that arbitrability is ordinarily a question for the courts under New York law, but noted that "an . . . exception has evolved which recognizes, respects and enforces a commitment by the parties, nevertheless, to arbitrate even that issue when they 'clearly and unmistakably [so] provide.' " *Id.* at 887 (quoting *AT&T*, 475 U.S. at 649). Relying upon the Second Circuit's opinion in *PaineWebber, Inc. v. Bybyk*, 81 F.3d 1193, 1199 (2d Cir. 1996), the New York Court of Appeals held that the words "any and all controversies" were expansive enough to " 'encompass disputes over whether a claim is timely and whether a claim is within the scope of arbitration.' " *Sacharow*, 689 N.E.2d at 887 (quoting *Bybyk*, 81 F.3d at 1199). The court further noted that "the appropriate remedy for the party alleging a violation of [§ 10304] of the NASD Code 'is to defend the arbitration action on timeliness grounds, not to enjoin arbitration altogether.' " *Id.* (quoting *Bybyk*, 81 F.3d at 1200).

the First Circuit Court of Appeals stated in *PaineWebber, Inc. v. Elahi*, 87 F.3d 589 (1st Cir. 1996):

> Section 2 of the Federal Arbitration Act ("FAA"), "is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). Although "[t]he FAA contains no express pre-emptive provision," and "[does not] reflect a congressional intent to occupy the entire field of arbitration," *Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford, Jr. Univ.*, 489 U.S. 468, 477 (1989), it was intended to "create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." *Moses H. Cone*, 460 U.S. at 24.

87 F.3d at 593 (parallel citations omitted).

The *Elahi* court was faced with a choice of law provision in the arbitration agreement which, as in the case before us, provided that "this agreement and its enforcement shall be construed and governed by the laws of the State of New York." *See* 87 F.3d at 591. Despite this contractual language, the *Elahi* court held that the parties' choice of law provision did not control the issue of arbitrability. The court, quoting *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63-64 (1995), held:

> "We think the best way to harmonize the choice-of-law provision with the arbitration provision is to read 'the laws of the State of New York' to encompass substantive principles that New York courts would apply, but not to include special rules limiting the authority of arbitrators. Thus,

> the choice-of-law provision covers the rights and duties of the parties, while the arbitration clause covers arbitration. . . . "

Elahi, 87 F.3d at 594. Thus, the federal substantive law of arbitrability, rather than state law, must be applied when deciding whether the arbitration at issue was time-barred under the NASD Code.[6] *See id.* at 593 ("[T]he question whether a court or an arbitrator applies the [NASD § 10304] time bar relates closely to 'arbitrability,' so we must apply the federal common law of arbitrability that has developed pursuant to the FAA."); *cf. UHC Mgmt. Co. v. Computer Sci. Corp.*, 148 F.3d 992, 996 (8th Cir. 1998) ("A number of post-*Mastrobuono* cases have interpreted that decision as similarly rejecting the notion that a general state choice-of-law clause appended to a contract that also includes an arbitration provision will preempt the applicability of the FAA in a federal court proceeding." (citing *Ferro Corp. v. Garrison Indus., Inc.*, 142 F.3d 926, 936-38 (6th Cir. 1998)); *Gallus Inv., L.P. v. Pudgie's Famous Chicken, Ltd.*, 134 F.3d 231, 233 (4th Cir. 1998); *National Union Fire Ins. Co. v. Belco Petroleum Corp.*, 88 F.3d 129, 134-35 (2d Cir. 1996); *Elahi*, 87 F.3d at 594 & n. 5; *Atlantic Aviation, Inc. v. EBM Group, Inc.*, 11 F.3d 1276, 1280 (5th Cir. 1994)).

We have no doubt that the arbitration agreement in this case, which was intended to cover "all controversies" related to Dean Witter's provision of investment services to Howsam, "involve[d] commerce" as broadly defined

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[6] Indeed, the New York Court of Appeals in *Sacharow* reached the same conclusion regarding the effect of the FAA. *See* 689 N.E.2d at 889.

by the Supreme Court in *Allied-Bruce Terminix Co. v. Dobson*, 513 U.S. 265, 277 (1995) (concluding that the "word 'involving,' like 'affecting,' signals an intent to exercise Congress' commerce power to the full"). *See Elahi*, 87 F.3d at 593; *Merrill Lynch, Pierce, Fenner & Smith v. Masland*, 878 F. Supp. 710, 712 (M.D. Pa. 1995) (finding arbitration agreement stemming from the parties' investment services relationship to fall within the purview of the FAA notwithstanding a choice of law provision in the contract selecting New York law); *Dean Witter Reynolds, Inc. v. Daily*, 12 F. Supp. 2d 1319, 1322 (S.D. Fla. 1998) (same). Accordingly, we hold that the 1992 ACCESS Agreement, as supplemented by the 1997 Submission Agreement, is subject to the federal substantive law of arbitrability despite the choice of law provision contained in the 1992 ACCESS Agreement. *See Elahi*, 87 F.3d at 593; *Masland*, 878 F. Supp. at 712 ("[The FAA] creates a body of federal substantive law of arbitrability. . . . [T]o the extent that the contract purports to establish New York law as controlling the issue of arbitrability, the contract language is preempted by [the FAA]."); *Daily*, 12 F. Supp. 2d at 1322 ("There is no dispute that the Account Agreement is within the scope of the FAA because it is one clearly 'involving commerce.' Thus the Court finds that the Account Agreement is subject to federal arbitration law rather than New York law." (citation omitted)). On the arbitrability issue before us, then, we are not governed by how the New York Court of Appeals construed similar arbitrability language, but are governed instead by the

federal law of arbitrability, as that law has been established in the Tenth Circuit by *Cogswell*.[7]

3) Under this court's *Cogswell* decision, the parties' agreement does not provide "clear and unmistakable" evidence of the parties' intent to have the arbitrability issue resolved by an arbitrator rather than the courts.

Of course, the most "clear and unmistakable" agreement to arbitrate the issue of arbitrability would be an express statement to that effect in the parties' contractual agreement to arbitrate disputes arising between them. Indeed, the Supreme Court has stated that "silence or ambiguity about the question 'who (primarily) should decide arbitrability,' " *First Options*, 514 U.S. at 944, should not be viewed as giving the arbitrators that power, "for doing so might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide," *id.* at 945. Given the Supreme Court's stated disregard for "silence or ambiguity" in the contractual language, it seems entirely possible that an express statement in the contract is not only preferable, but necessary, to a finding that the parties "clearly and unmistakably" agreed to

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[7] Were we to address the merits of *Sacharow* 's analysis as to whether the parties had "clearly and unmistakably" agreed to submit the issue of arbitrability to the arbitrators rather than the courts, we would respectfully disagree with the *Sacharow* holding. We believe the *Sacharow* court gave insubstantial weight to the presumption established in *First Options* that parties to arbitration agreements generally intend arbitrability questions to be resolved by the courts.

submit arbitrability questions to an arbitrator rather than the courts. We need not resolve that issue, however, because the language contained in the 1992 ACCESS Agreement and 1997 Submission Agreement falls squarely within this court's previous holding in *Cogswell* and thus cannot, under *Cogswell*, provide "clear and unmistakable" evidence of the parties' intent.[8]

The *Cogswell* court focused on the language of relevant provisions in the NASD Code when it determined that the parties' agreement did not provide "clear and unmistakable" evidence of the parties intent regarding the arbitrability issue. The NASD Code language addressed by the *Cogswell* court is identical to the NASD Code language adopted in the 1997 Submission Agreement, such that *Cogswell* governs our interpretation of that language. In addition, even if we go beyond the NASD Code sections analyzed by the *Cogswell* court, the

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[8] We note that there is some confusion in the case law as to *which* language should be relied upon to decide whether the parties have "clearly and unmistakably" decided to arbitrate the issue of arbitrability. While some courts look to the language of the parties' contract, *see, e.g., Dean Witter Reynolds, Inc. v. Daily*, 12 F. Supp. 2d 1319, 1322 (S.D. Fla. 1998) (analyzing agreement regarding "all controversies . . . arising out of or concerning any such account, [or] any transactions . . . "), other courts look only at the relevant provisions in the NASD Code, *see, e.g., Cogswell*, 78 F.3d at 481; *Edward D. Jones & Co. v. Sorrells*, 957 F.2d 509, 512 (7th Cir. 1992) (analyzing the parties' intent by looking to the NASD Code). Regardless of which language this court considers in the instant case, however, *Cogswell* mandates a finding that arbitrability must here be determined by the court because the agreements between Howsam and Dean Witter did not "clearly and unmistakably" provide that the question of arbitrability should be resolved by an arbitrator.

language contained in the underlying arbitration agreements at issue in *Cogswell* is materially indistinguishable from the language of the 1992 ACCESS Agreement and 1997 Submission Agreement at issue in this case.

In *Cogswell*, the original arbitration agreement stated that the parties "agree[d] that any controversy arising out of [the client's] business or this Agreement shall be submitted to arbitration conducted according to the rules and procedures of the New York Stock Exchange, Inc. ("NYSE") or of the National Association of Securities Dealers, Inc. ("NASD") as [the client] may elect." *See Cogswell*, 78 F.3d at 475. Here, as noted above, the 1992 ACCESS Agreement stated:

> The Client agrees that all controversies between the Client and Dean Witter and/or any of its officers, directors, or employees, present or former, concerning or arising from (i) any account maintained with Dean Witter by Client; (ii) any transaction involving Dean Witter and Client, whether or not such transaction occurred in such account or accounts; or (iii) the construction, performance or breach of this or any other agreement between us, whether such controversy arose prior to, on or subsequent to the date hereof, shall be determined by arbitration. . . .

We find no material difference between the contractual language at issue in *Cogswell* and the relevant contractual language contained in the 1992 ACCESS Agreement.

Similarly, the uniform submission agreement signed by the *Cogswell* plaintiff when initiating the arbitration proceeding stated that the proceeding would be governed

by the "Constitution, By-Laws, Rules, Regulations and/or Code of Arbitration . . . of the [NASD]." *See id.* Here, the 1997 Submission Agreement stated: "The undersigned parties hereby submit the present matter in controversy, as set forth in the attached statement of claim, . . . to arbitration in accordance with the Constitution, By-Laws, Rules, Regulations, and/or Code of Arbitration Procedure of the sponsoring organization." Again, there is no material difference between the submission agreement at issue in *Cogswell* and the 1997 Submission Agreement at issue in the present case.

The only potentially material difference between the contractual language in *Cogswell* and the language at issue here is that the parties in this case also agreed in the 1992 ACCESS Agreement to "waiv[e] their right to seek remedies in court, including the right to a jury trial." This language played a substantial part in the district court's opinion below. *See Dean Witter Reynolds, Inc. v. Howsam*, No. 97-WM-1463, slip op. at 3-4 (D. Colo. June 28, 1999). We do not find it availing, however. At most, this language is ambiguous and therefore does not satisfy the *First Options* requirement of a "clear and unmistakable" intent by the parties to have the NASD § 10304 arbitrability issue decided by an arbitrator rather than a court. The language does not refer specifically to arbitrability, and it is unlikely that it was intended to state that Howsam could not in any circumstance resort to the courts. Such a literal reading of the provision would mean that Howsam had waived any ability to seek an order compelling arbitration, *see* 9 U.S.C. §§ 3, 4, or to seek judicial enforcement of an arbitration award, *see id.* § 9, or even to seek vacatur of the arbitrator's award if the arbitrator

exceeded his or her powers, *see id.* at § 10. Such a reading would essentially nullify Howsam's arbitration rights entirely, and yet if Howsam did not intend by this clause to waive all her rights to seek judicial assistance with the arbitration process, she can hardly argue that the clause "clearly and unmistakably" waives both parties' right to seek a judicial determination of arbitrability. The reference to a "jury trial," in particular, is peculiar, although it is perhaps a reference to the jury trial rights found in Section 4 of the FAA, *see* 9 U.S.C. § 4. Regardless of its exact meaning, the "jury trial" reference suggests a narrow scope to the clause, perhaps suggesting that issues that are arbitrable should be determined according to the remedies available in arbitration without resort to additional judicial remedies. Whatever it means, however, this clause is simply not a clear and unambiguous statement that courts should not be involved in the threshold arbitrability question at issue in this case.

We recognize that the circuit courts of appeals are almost evenly divided on the issue of whether the limitations period set forth in NASD Code § 10304 is a substantive eligibility requirement, or jurisdictional prerequisite to arbitration, which must be determined in the first instance by the courts. The Third, Sixth, Seventh, Tenth and Eleventh Circuits have all answered that question in the affirmative, while the First, Second, Fifth, Eighth and Ninth Circuits have all answered that question in the negative. *See Elahi*, 87 F.3d at 596-99 (collecting and discussing cases from other circuits). Ultimately, questions of arbitrability and who decides whether a particular claim is arbitrable are matters of the parties' intent. It therefore seems to this court that amendment by the

NASD and other arbitration forums of their rules and submission agreements to "clearly and unmistakably" resolve this issue one way or another is long overdue.[9] Until the arbitration organizations undertake such action, however, we are bound by the presumptions established in *First Options* and our own Tenth Circuit precedent in *Cogswell*.

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[9] We note that the NASD has proposed at least two amendments to § 10304 in the last seven years that would have resolved the "who decides arbitrability" question conclusively in favor of the NASD deciding whether a particular claim is time-barred under § 10304. *See* Self Regulatory Organizations, Notice of Filing of Amended Proposed Rule Change by National Association of Securities Dealers, Inc. Relating to the Eligibility of Disputes for Arbitration, 59 Fed. Reg. 39,373, at 39,373-74 (proposed July 26, 1994) (stating "the Director of Arbitration shall determine if the claim is eligible for submission to arbitration by determining if the claim alleges that less than six (6) years have elapsed between the occurrence or event giving rise to the dispute, claim or controversy and filing of the claim.") (withdrawn from SEC consideration in October 1994, *see Elahi*, 87 F.3d at 596 n.9); Self Regulatory Organizations, Notice of Filing of Proposed Rule Change by the National Association of Securities Dealers, Inc. Relating to the Eligibility of Claims for Arbitration, 63 Fed. Reg. 588, at 589 (proposed Jan. 6, 1998) (stating that the Director of Arbitration, if asked by one of the parties to decide eligibility under § 10304, will determine eligibility and that his decision is final and binding upon the parties) (not adopted as of January 2000, *see J.E. Liss & Co. v. Levin*, 201 F.3d 848, 851 (7th Cir. 2000)). It appears, however, either that the NASD has withdrawn, or that the Securities and Exchange Commission has refused to approve, the amendments to § 10304 proposed by the NASD over the last several years.

CONCLUSION

For the foregoing reasons, we REVERSE the decision of the district court and REMAND for further proceedings not inconsistent with this opinion.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Walker D. Miller

Civil Action No. 97-WM-1463

DEAN WITTER REYNOLDS, INC., a Delaware corporation,

Plaintiff,

v.

KAREN HOWSAM, individually and as Trustee for the E. Richard Howsam, Jr., irrevocable Life Insurance Trust Dated May 14, 1982.

Defendant.

ORDER

(Filed June 28, 1999)

Miller, Jr.

This matter is before the Court on Defendant's Motions to Amend Order Staying Arbitration, to Dismiss for Failure to Join an Indispensable Party and to Dismiss for Lack of Jurisdiction. This matter is also before the Court on Plaintiff's Motion to Exclude Matters Outside of the Pleadings. The court will address all pending motions collectively in this Order.

On August 31, 1998, Defendant filed a motion in this Court to Dismiss for Lack of Jurisdiction. The motion is premised on a 1997 decision by the Court of Appeals of New York that, while interpretation of Section 15 of the National Association of Securities Dealers (NASD) Code of Arbitration Procedure is a question of arbitrability, it is

a question to be decided by arbitrators, not courts. *In re Smith Barney Shearson Inc. v. Sacharow*, 666 N.Y.S.2d 990 (N.Y. 1997).

Section 15 (now denominated as Rule 10304) of the NASD Code states:

> No dispute, claim, or controversy shall be eligible for submission to arbitration under this Code where six (6) years have elapsed from the occurrence or event giving rise to the act or the dispute, claim or controversy. This Rule shall not extend applicable statutes of limitations, nor shall it apply to any case which is directed to arbitration by a court of competent jurisdiction.

The Defendant claims that this New York case is controlling in the instant case as a result of a specific provision contained in the ACCESS Client Service Agreement that Plaintiff and Defendant entered into in August of 1992. The provision states: "[t]his Agreement shall be construed and enforced in accordance with the laws of the state of New York without reference to choice of law doctrine." In light of the *Sacharow* decision and the governing law provision in the ACCESS agreement, it is Defendant's position that this Court lacks subject matter jurisdiction to decide the merits of this case.

Plaintiff contends the *Sacharow* decision does not trump the law of the Tenth Circuit, regardless of the parties' choice of law provision. Tenth Circuit law states the general rule that courts, not arbitrators, are to decide whether a claim is arbitrable under NASD Section 15. *Cogswell v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 78 F.3d 474 (10th Cir. 1996).

Although the parties view the two cases as contradictory, both cases recognize the same general rule and exception: Although the question of arbitrability is normally a question for the courts, not the arbitrators, the parties may, by clear and unmistakable language, provide otherwise. *See Cogswell*, 78 F.3d at 481 ("the issue . . . is whether the parties' agreement contains 'clear and unmistakable' evidence they intended the arbitrator to decide the issue [of whether § 15 applies]"); *Sacharow*, 666 N.Y.S.2d at 993 ("we note the well-settled proposition that the question of arbitrability is an issue generally for judicial determination in the first instance. . . . An important legal and practical exception has evolved which recognizes, respects and enforces a commitment by the parties, nevertheless, to arbitrate even that issue when they 'clearly and unmistakably [so] provide' ").

Accordingly, the issue before me is whether the parties, in the arbitration agreement, clearly and unmistakably agreed to submit all issues, including that of arbitrability, to the arbitrator for resolution.

The agreement provides:

> [t]he client agrees that *all controversies* between the Client and Dean Witter and or any of its officers, directors, or employees, present or former, concerning or arising from (i) *any account* maintained with Dean Witter by the Client; (ii) any transaction involving Dean Witter and the Client, whether or not such transaction occurred in such account or accounts; or (iii) the *construction*, performance or breach of this or any agreement between us, whether such controversy arose *prior to, or subsequent to the date hereof*, shall be determined by arbitration before any self-

> regulatory organization or exchange of which Dean Witter is a member.

Agreement, ¶ 19 (emphasis added). Like the arbitration provision at issue in *Sacharow*,[1] the parties here have agreed to arbitrate "all controversies" arising from their relationship. Importantly, the agreement also contains a key provision indicating they did not intend to leave recourse to judicial intervention: "The parties are waiving their right to seek remedies in court, including the right to a jury trial." *Id.* Despite Plaintiff's assertions to the contrary, the totality of this broad language clearly and unmistakably evidences the parties' intention to have *all* disputed issues, including those of eligibility of arbitration pursuant to Section 15, arbitrated and not judicially determined. Therefore, my determination that I lack subject matter jurisdiction to consider the section 15 issue is not contrary to *Cogswell*.

This action must be returned to the arbitration panel to determine whether or not Defendant Howsam's claim falls within the limitations set forth in NASD Code Section 15.

Plaintiff also argues that Defendant's motion is not properly brought under Rule 12(b)(1) and should be treated as a motion filed pursuant to Rule 12(b)(6). I disagree. Defendant in her motion is merely asserting that, pursuant to the agreement entered into by the parties, an arbitration panel rather than this Court has the

---

[1] Plaintiff asserts that the language in the ACCESS agreement is not as broad as that in *Sacharow* and that there is no evidence that the parties in this case intended to have eligibility disputes determined through arbitration. I conclude otherwise.

jurisdiction to decide whether or not Defendant's claims are arbitrable under NASD Section 15.

"A court is required to convert a Rule 12(b)(1) motion to dismiss into a Rule 12(b)(6) motion or a Rule 56 summary judgment motion when resolution of the jurisdictional question is intertwined with the merits of the case." *Holt v. United States*, 45 F.3d 1000, 1003 (10th Cir. 1995). Defendant, in her motion, is only challenging this Court's authority to decide the merits of the case. The jurisdictional question, *i.e. who* (courts or arbitrators) has the jurisdiction to decide eligibility, is wholly separate from the decision as to *whether* the claims are eligible for arbitration. Defendant's motion is properly brought under Rule 12(b)(1), and this Court will not convert it into a motion to dismiss under Rule 12(b)(6) or a motion for summary judgment under Rule 56. Accordingly, this Court is free to consider the ACCESS agreement drafted by Dean Witter and signed by both parties in reviewing Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction.

Accordingly, it is ordered:

1. Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction (#30) is granted.

2. Defendant's Motion to Dismiss for Failure to Join an Indispensable Party (#14) is denied as moot.

3. Plaintiff's Motion to Exclude Matters Outside the Pleadings (#34) is denied as moot.

4. Defendant's Motion to Amend Order Staying Arbitration (#10) is denied as moot.

5. The Status Conference set for July 1, 1999, at 2:00 p.m. is vacated.

6. This matter shall be dismissed with prejudice.

DATED this 25th day of June, 1999.

BY THE COURT:

/s/ Walker D. Miller
Walker D. Miller
United States
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Walker D. Miller

CERTIFICATE OF MAILING

Civil Action No. 97-WM-1463

Copies of this Order were served by (*) delivery; or (**) depositing the same in the United States mail, postage prepaid, addressed to the persons listed below.

Lisa S. Casey*
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Alan Friedberg**
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Magistrate Judge Patricia A. Coan

Dated: June 25, 1999

/s/ [Illegible]
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Walker D. Miller

Civil Action No. 97-WM-1463

DEAN WITTER REYNOLDS, INC.,
a Delaware corporation,

Plaintiff,

v.

KAREN HOWSAM, individually and as Trustee
for the E. Richard Howsam, Jr.,
Irrevocable Life Insurance Trust
Dated May 14, 1982,

Defendant.

FINAL JUDGMENT

(Filed June 28, 1999)

In accordance with orders filed during the pendency of this case, and pursuant to Fed. R. Civ. P. 58(2), the following FINAL JUDGMENT is hereby entered.

Pursuant to the written Order filed by Judge Walker D. Miller on June 28, 1999, judgment is entered as follows:

1. Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction (#30) is granted.

2. Defendant's Motion to Dismiss for Failure to Join an Indispensable Party (#14) is denied as moot.

3. Plaintiff's Motion to Exclude Matters Outside the Pleadings (#34) is denied as moot.

4. Defendant's Motion to Amend Order Staying Arbitration (#10) is denied as moot.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Walker D. Miller

CERTIFICATE OF MAILING

Civil Action No. 97-WM-1463

Copies of this Final Judgment, signed by Chief Deputy Clerk Stephen P. Ehrlich on June 28, 1999, were served by (*) delivery; or (**) depositing the same in the United States mail, postage prepaid, addressed to the persons listed below.

Lisa S. Casey*
Holme Roberts & Owen LLP
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Alan Friedberg**
303 E. 17th Ave.
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Denver, CO 80203

Magistrate Judge Patricia A. Coan

Dated: June 28, 1999 /s/ Stephen P. Ehrlich
Deputy Clerk

Supreme Court, U.S.
FILED
JAN 2 2002
CLERK

(2)

No. 01-800

IN THE

Supreme Court of the United States

KAREN HOWSAM, individually and as Trustee for the E. Richard Howsam, Jr., Irrevocable Life Insurance Trust dated May 14, 1982,

Petitioner,

v.

DEAN WITTER REYNOLDS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

In *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), following long-standing precedent, this Court unanimously ruled that courts, rather than arbitrators, should decide the arbitrability of a dispute unless there is clear and unmistakable evidence that the parties agreed to allow the arbitrators to decide that question. The Tenth Circuit's opinion faithfully applied *First Options* after reviewing the relevant arbitration agreements to find no such clear and unmistakable evidence.

The Tenth Circuit's ruling is unexceptional, and its decision has no far-reaching implications to arbitration law. Rather, petitioner merely seeks to have this Court review several provisions of the parties' arbitration agreements and the National Association of Securities Dealers ("NASD") Code of Arbitration Procedures, a Code which is subject to ongoing review and revision by the NASD.

The question presented is:

Whether the Tenth Circuit properly interpreted several provisions of the parties' arbitration agreements to find that they presented no clear and unmistakable evidence authorizing the arbitrators to decide the arbitrability of the dispute.

STATEMENT PURSUANT TO RULE 29.6

Dean Witter Reynolds, Inc., Respondent, is 100% owned by Morgan Stanley Dean Witter & Co., a publicly traded company.

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STATEMENT OF THE CASE

Dean Witter Reynolds, Inc. ("Dean Witter") filed an action in the District Court of Colorado seeking to enjoin an arbitration proceeding instituted by Petitioner Karen Howsam in March 1997. Howsam's NASD arbitration claim sought to recover on claims arising from her purchase of several limited partnerships. Dean Witter asserted that the dispute was ineligible for arbitration under the terms of the parties' arbitration agreement, and that, because the eligibility of the dispute presented an issue of arbitrability, the court and not the arbitrators should decide the question. App. 4-6.

Howsam and Dean Witter entered into two arbitration agreements. App. 3-5. The first agreement, the ACCESS Client Service Agreement ("1992 ACCESS Agreement"), was executed in 1992. App. 3. The second arbitration agreement is a Uniform Submission Agreement ("1997 Submission Agreement"), which Howsam executed when she submitted her arbitration claim to the NASD in March 1997. App. 4-5.

The 1997 Submission Agreement states that the arbitration would be conducted in accordance with the rules and provisions of the NASD Code, including the NASD Code of Arbitration Procedure. App. 4-5. The agreement specifically provides:

> The undersigned parties hereby submit the present matter in controversy, as set forth in the attached statement of claim, . . . to arbitration in accordance with the Constitution, By-Laws, Rules, Regulations, and/or Code of Arbitration Procedure of the sponsoring organization.

App. 4-5.

Another provision of the 1997 Submission Agreement states that the parties "have read the procedures and rules of the sponsoring organization relating to arbitration." App. 5. One of the relevant provisions of the NASD Code of Arbitration Procedure, Section 10304, states in pertinent part:

> No dispute, claim or controversy shall be eligible for submission to arbitration under this Code where six (6) years have elapsed from the occurrence or event giving rise to the act or dispute, claim or controversy.

App. 5.[1]

Based on this six-year eligibility rule, Dean Witter requested that the district court enjoin the pending NASD arbitration until the court determined which, if any, of Howsam's claims are eligible for submission to arbitration. Relying on *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), Dean Witter asserted that, because the parties' agreements to arbitrate do not reflect clear and unmistakable evidence that the parties authorized the arbitrators to decide the arbitrability of the dispute, that question was properly submitted to the court. App. 5-6.

The district court dismissed Dean Witter's complaint, ruling that the parties had agreed to arbitrate the issue of arbitrability. App. 31-36. The district court relied upon two provisions in the 1992 ACCESS Agreement: (i) a provision stating that the parties would arbitrate "all controversies"; and (ii) a disclosure

1. The six-year limit imposed by the NASD eligibility rule is the longest length of time that brokerage firms are mandated by the rules of the Securities and Exchange Commission to maintain their customer documents. *See, e.g.*, 17 C.F.R. §§ 240.17a-4

statement reflecting that, by entering into the arbitration agreement, the parties were waiving all remedies in court, including the right to a jury trial. App. 33-34.

Relying on *First Options*, the Tenth Circuit reversed the district court's dismissal, ruling that the arbitration agreements do not reflect clear and unmistakable evidence authorizing the arbitrators to decide the arbitrability of the dispute. App. 1-30. The court accordingly held that arbitrability was an issue for the court to decide. App. 24-29.

In reaching its conclusion, the Tenth Circuit examined the language of the 1992 ACCESS Agreement and the 1997 Submission Agreement, as well as the interplay between the two agreements. App. 12-15, 26-28. The court determined that the 1997 Submission Agreement had supplemented the earlier 1992 ACCESS Agreement by defining the issues that were to be arbitrated:

> [T]he earlier arbitration agreement had been supplemented by the submission agreement, at least to the extent that it identified the rules and regulations by which the plaintiff, through her election of the NASD as the arbitral body, agreed to be bound.

App. 14. Based on the contractual language, the Tenth Circuit found no clear and unmistakable evidence of an intent to allow the arbitrators to decide arbitrability. App. 26-28.

First, the court noted that both agreements were silent on the issue of who decides arbitrability and, examining the "all controversies" clause in the 1992 ACCESS Agreement, found no clear and unmistakable evidence of an intent to allow the arbitrators to decide the arbitrability issue. App. 26. Further,

the court examined the waiver of judicial remedies clause and found as follows:

> At most, this language is ambiguous and therefore does not satisfy the *First Options* requirement of "clear and unmistakable" intent by the parties to have the NASD § 10304 arbitrability issue decided by an arbitrator rather than a court. The language does not refer specifically to arbitrability, and it is unlikely that it was intended to state that Howsam could not in any circumstance resort to the courts. Such a literal reading of the provision would mean that Howsam had waived any ability to seek an order compelling arbitration, *see* 9 U.S.C. §§ 3, 4, or to seek judicial enforcement of an arbitration award, *see id.* §9, or even to seek vacatur of the arbitrator's award . . . [s]uch a reading would essentially nullify Howsam's arbitration rights entirely, and yet if Howsam did not intend by this clause to waive all of her rights to seek judicial assistance with the arbitration process, she can hardly argue that the clause "clearly and unmistakably" waives both parties' rights to seek a judicial determination of arbitrability.

App. 27-28.

Finally, noting the conflict among the circuits, on which conflict Howsam relies in seeking a writ of certiorari, the Tenth Circuit focused on the NASD's interpretation of its eligibility rule:

> We recognize that the circuit courts of appeals are almost evenly divided on the issue of whether the limitations period set forth in NASD Code

> § 10304 is a substantive eligibility requirement, or jurisdictional prerequisite to arbitration, which must be determined in the first instance by the courts. The Third, Sixth, Seventh, Tenth and Eleventh Circuits have all answered that question in the affirmative, while the First, Second, Fifth, Eighth and Ninth Circuits have all answered that question in the negative. Ultimately, questions of arbitrability and who decides whether a particular claim is arbitrable are matters of the parties' intent. It therefore seems to this court that amendment by the NASD and other arbitration forums of their rules and submission agreements to "clearly and unmistakably" resolve this issue one way or another is long overdue. Until the arbitration organizations undertake such action, however, we are bound by the presumptions established in *First Options* and our own Tenth Circuit precedent. . . .

App. 28-29 (citation and footnote omitted).[2]

REASONS FOR DENYING THE WRIT

The legal principles underpinning the Tenth Circuit's ruling were announced – and have repeatedly been affirmed – by this Court. As a fundamental starting point, "[a]rbitration is a matter of contract and a party cannot be required to submit

2. The court noted that the NASD "has proposed at least two amendments to § 10304 in the last seven years that would have resolved the 'who decides arbitrability' question conclusively in favor of the NASD deciding whether a particular claim is time-barred," but that "either the NASD has withdrawn, or the Securities and Exchange Commission has refused to approve," the proposed amendments. App. 29 n.9.

to arbitration any dispute which he has not agreed so to submit." *AT&T Tech., Inc. v. Communications Workers of Am.*, 475 U.S. 643, 648 (1986) (citations and internal quotations omitted). Three years after pronouncing this principle, the Court reiterated the rule in *Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468 (1989), holding that the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16, "does not require parties to arbitrate when they have not agreed to do so, . . . nor does it prevent parties who do agree to arbitrate from excluding certain claims from the scope of their arbitration agreement," but that the FAA "simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms." *Id.* at 478 (citations and internal quotations omitted).

> Arbitration is a matter of consent, not coercion, and the parties are generally free to structure their agreements as they see fit. Just as they may limit by contract the issues which they will arbitrate, so to may they specify by contract the rules under which that arbitration will be conducted.

Id. at 479.

As the Court noted in *AT&T*: "[T]he principles necessary to decide this case are not new. They were set forth over 25 years ago in a series of cases known as the "Steel Workers Trilogy," *i.e.*, *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 80 S. Ct. 1343 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). *AT&T*, 475 U.S. at 648. The Court reiterated that the question whether the parties had agreed to arbitrate a dispute was for the court to decide:

> [T]he question of arbitrability – whether a collective-bargaining agreement creates a duty for the parties to arbitrate the particular grievance – is undeniably an issue for judicial determination. Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator.

Id. at 649 (citing *Warrior & Gulf*, 363 U.S. at 582-83 and *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 241 (1962), *overruled in part on other grounds*, *Boys Markets, Inc. v. Retail Clerks*, 398 U.S. 235 (1970)). The Court accordingly held that it was "the court's duty to interpret the agreement and to determine whether the parties intended to arbitrate." *Id.* at 651.

In *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), the Court unanimously set forth the standards for determining whether the courts or the arbitrators are to decide the issue of arbitrability. The Court held that the courts decide whether the parties have agreed to arbitrate a dispute unless there is "clear and unmistakable evidence" that the parties agreed to have the arbitrators decide the issue. *Id.* at 944 (quoting *AT&T*, 475 U.S. at 649). If the arbitration agreement is silent or ambiguous, *the courts are to decide the issue of arbitrability*. *Id.* at 944-45. The Court noted

> given the principle that a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration, one can understand why courts might hesitate to interpret silence or ambiguity on the "who should decide arbitrability" point as giving the arbitrators that power, for doing so might too often force unwilling parties to arbitrate a matter

> they reasonably would have thought a judge, not an arbitrator, would decide.

Id. at 945 (citations omitted).

This case presents nothing more than a proper application of this Court's decisions by the Tenth Circuit. The governing precedent summarized above has created four primary rules: (1) arbitration is a matter of contact; (2) a party can not be required to submit to arbitration a dispute it has not agreed to arbitrate; (3) the courts generally decide arbitrability, *i.e.*, whether the parties have agreed to submit a dispute to arbitration; and (4) it is only when there is clear and unmistakable evidence of an intent to allow the arbitrators to decide the issue that the courts should not decide arbitrability. The Tenth Circuit's opinion, holding that the courts are to decide the arbitrability of the dispute between Dean Witter and Howsam – based on the particular language of the agreements between the parties, which does not reflect the requisite clear and unmistakable evidence of an intent to allow the arbitrators to decide arbitrability – is a correct application of these rules.

There is no need for the Court to revisit these principles of arbitration law. While the Circuits are admittedly split on the interpretation of the NASD Code's language and the interplay of that language with the provisions of various arbitration agreements, there is no broad national rule that could emerge from this case – which is, after all, merely a case of contract interpretation.

I. The Tenth Circuit Properly Applied *First Options*.

The Tenth Circuit was presented with an issue of arbitrability. The very wording of NASD's six-year rule, stating that "no dispute . . . shall be eligible for submission under this Code," § 10304, NASD Code of Arbitration Procedure, makes this clear. As *First Options* noted, the issue of arbitrability focuses on whether the parties agreed to arbitrate the merits of the dispute. 514 U.S. at 942. The question whether certain claims are *excluded* from arbitration, like the exclusion in *AT&T*, goes directly to the issue of arbitrability. Relying on its prior opinion in *Cogswell v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 78 F.3d 474 (10th Cir. 1996), the Tenth Circuit determined that the very language of § 10304, which language excludes a category of claims from submission to arbitration, means that § 10304 governs the arbitrability of the parties' dispute – and thus triggered the *First Options* standards. App. 17-19.

In *Cogswell*, the court held that § 10304 " 'can reasonably be read in only one way – as a substantive limit on the claims that the parties have contracted to submit to arbitration.' " *Cogswell*, 78 F.3d at 479 (quoting *PaineWebber Inc. v. Hofmann*, 984 F.2d 1372, 1379 (3d Cir. 1993)). The *Cogswell* court continued:

> "Eligible" is defined as "fitted or qualified to be chosen or used" or "worthy to be shown or selected." Webster's Third New International Dictionary 736 (1966). "Submission" is defined as the act of commi[tting something] for consideration, study or decision. *Id.* at 2277.

Id. at 479 (quoting *PaineWebber Inc. v. Hartmann*, 921 F.2d 507, 513 (3d Cir. 1990)).[3] This Court has described arbitrability in a similar fashion. *See, e.g., AT&T Tech.*, 475 U.S. at 648 ("a party cannot be required to *submit* to arbitration any dispute which he has not *agreed* so to submit.") (emphasis added; citations omitted); *First Options*, 514 U.S. at 943 ("arbitration is simply a matter of contact between the parties; it is a way to resolve those disputes – but only those disputes – that the parties have agreed to submit to arbitration."); *id.* at 945 ("given the principle that a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration. . . .").[4] Hewing closely to *First Options*, the Tenth Circuit looked to the language of the parties' arbitration agreements to determine whether there was clear and unmistakable evidence of an agreement to allow the arbitrators to decide arbitrability.

Howsam argued that the "all controversies" language in the 1992 ACCESS Agreement, combined with another

3. It is this submission language that distinguishes *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964). Howsam argues that the Tenth Circuit's opinion is contrary to *John Wiley* and that § 10304 is a matter of "procedural" arbitrability, which is for the arbitrators to decide. This is a surprising assertion, primarily because Howsam never cited to *John Wiley* in her brief to the Tenth Circuit. In any event, the Tenth Circuit's opinion in no way jeopardizes *John Wiley*, which addressed a fundamentally different agreement. Here, the agreement expressly precludes the submission of claims that are more than six years old.

4. Howsam conceded below that arbitrability was normally an issue for the court to decide. The focus of her argument was that, in this case, the parties had clearly and unmistakably provided otherwise in their arbitration agreement.

provision disclosing that the parties "waiv[e] their right to seek remedies in court, including the right to a jury trial" provided the necessary clear and unmistakable evidence to overcome the *First Options* presumption. The court, however, noted that *none* of these provisions so much as mentioned arbitrability, such that there is no clear and unmistakable evidence of an intent to allow the arbitrators to decide arbitrability. App. 25-28. The court also observed that the NASD has taken shifting positions on the issue of whether the arbitrators or the courts should decide arbitrability. App. 29 n.9.

The Tenth Circuit properly undertook the *First Options* analysis to determine whether there was clear and unmistakable evidence of an intent to allow the arbitrators to decide the arbitrability issue. This Court has repeatedly ruled on the manner in which courts should deal with the arbitrability issue, and granting certiorari in this case would add nothing to that jurisprudence. Even if the Tenth Circuit's ruling that § 10304 of the NASD Arbitration Code concerns the arbitrability of the parties' dispute (because the provision excludes a category of claims), were somehow incorrect, that ruling is contract-specific and presents no question of national importance. This case hinged on resolving the precise language and effect of several provisions in the arbitration agreements and the NASD Code of Arbitration, and nothing more.

Moreover, any ruling by this Court on the interpretation of the NASD Code sections at issue could easily be rendered moot by the NASD.[5] As the Tenth Circuit noted in its

5. Some courts that have reviewed the § 10304 eligibility issue have examined other provisions of the NASD Code, such as former § 35 (now § 10324) to determine whether there was clear and (Cont'd)

decision, the NASD Arbitration Code is subject to amendment or revision – and there have been several attempts over the years, including one as recently as 1998, to modify or revise § 10304. App. 29 n.9 ("the NASD has proposed at least two amendments to § 10304 in the last seven years that would have resolved the 'who decides arbitrability' question conclusively in favor of the NASD deciding whether a particular claim is time-barred under § 10304"). The proposals would have made the NASD Director the final authority on whether claims were eligible under § 10304.

The most recent proposal was either withdrawn or not approved by the Securities Exchange Commission.[6] The need for any definitive resolution by this Court, however, should await further action by the NASD, particularly in light of the Tenth Circuit's call for precisely such action. App. 29.

(Cont'd)
unmistakable evidence of an intent to allow the arbitrators to decide the issue. *See, e.g., FSC Secs. Corp. v. Freel*, 14 F.3d 1310, 1312 (8th Cir. 1994); *PaineWebber, Inc. v. Bybyk*, 81 F.3d 1193, 1202 (2d Cir. 1996).

6. The NASD's sometimes conflicting views and comments on § 10304 have affected how some courts have interpreted the section. *See, e.g., PaineWebber Inc. v. Farnam*, 870 F.2d 1286, 1292 (7th Cir. 1989) (considering 1988 NASD letter stating NASD would not process ineligible claims); *PaineWebber Inc. v. Elahi*, 87 F.3d 589, 596 (1st Cir. 1996) (noting that in 1996 the NASD's view was that the NASD Code was silent on whether courts or arbitrators decide the eligibility of claims); *FSC Sec. Corp. v. Freel*, 811 F. Supp. 439, 444 n.6 (D. Minn. 1993) (noting NASD has taken conflicting positions on interpretation of predecessor to § 10304), *aff'd*, 14 F.3d 1310 (8th Cir. 1994).

II. Petitioner's "Efficiency" Agreement Was Rejected by This Court in *First Options*.

In an argument that runs directly counter to the Court's ruling in *First Options*, Howsam asserts that having the courts resolve the arbitrability issue imposes "a wasteful layer of litigation in the arbitration process." Petition at 9. This Court rejected a similar "efficiency" argument in *First Options*:

> There is no strong arbitration-related policy favoring First Options in respect to its particular argument here. After all, the basic objective in this area is not to resolve disputes in the quickest manner possible, no matter what the parties wishes, but to ensure that commercial arbitration agreements, like other contracts, are enforced according to their terms. . . .

514 U.S. at 947 (citations omitted).

Arbitrability goes to the heart of enforcing agreements according to their terms. Having courts decide arbitrability necessarily results in litigation. Indeed, that is exactly what happened in *AT&T*, where this Court reversed the Seventh Circuit with directions to have the court interpret whether a particular dispute was excluded from arbitration, 475 U.S. at 649, and in *First Options*, where the Third Circuit had examined the record to determine whether the parties had agreed to arbitrate. *Kaplan v. First Options of Chicago, Inc.*, 19 F.3d 1503 (3d Cir. 1994), *aff'd*, 514 U.S. 938 (1995). Howsam's contentions conflict with the overriding policy of arbitration law and with *First Options*; there is no reasoned basis in the Petition upon which the Court should grant certiorari to revisit its ruling in *First Options*.

III. New York Law Does Not Govern This Case.

In a final misplaced effort to attract the Court's attention to her Petition, Howsam argues that the Tenth Circuit erred by refusing to follow the New York courts' interpretation of § 10304. Howsam maintains that the Tenth Circuit was obliged to follow *Smith Barney Shearson, Inc. v. Sacharow*, 689 N.E.2d 884 (N.Y. 1997). This argument, like Howsam's other contentions, is at odds with the Court's prior rulings.

As a starting point, Howsam does not dispute that this case is governed by the Federal Arbitration Act, 9 U.S.C. §§ 1-16, because the parties' underlying relationship involves interstate commerce. In *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983), the Court ruled that 9 U.S.C. § 2 "create[s] a body of federal substantive law of arbitrability, applicable to any arbitration agreement within coverage of the Act." *Id.* at 24. The Tenth Circuit analyzed *Sacharow*, and held that it was not bound to follow New York law because federal substantive arbitration law applies to this dispute, relying on *First Options*, and its own prior decisions. App. 21-24. ("On the arbitrability issue before us, then, we are not governed by how the New York Court of Appeals construed similar language, but are governed instead by the federal law of arbitrability, as that law has been established in the Tenth Circuit by *Cogswell*.").

Moreover, this Court has previously addressed a New York choice-of-law provision in an arbitration agreement in *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995). In that case, Shearson challenged an award of punitive damages by an arbitration panel on the ground that a New York choice-of-law provision incorporated New York arbitration law, which precluded arbitrators from awarding

punitive damages. The Court held that the New York choice-of-law provision did not apply to the arbitration provisions:

> We think the best way to harmonize the choice-of-law provision with the arbitration provision is to read 'the laws of the State of New York' to encompass substantive principles that New York courts would apply, but not to include special rules limiting the authority of arbitrators. Thus, the choice-of-law provision covers the rights and duties of the parties, while the arbitration clause covers arbitration. . . .

Id. at 63-64.

Under *Mastrobuono*, a provision that requires the application of New York *substantive* law does not implicate New York *arbitration* law. The Tenth Circuit's ruling on the New York law issue, like the court's other rulings in this case, is both unremarkable and a correct application of this Court's precedent, in this instance the law announced by this Court in *Moses H. Cone* and *Mastrobuono*.

CONCLUSION

For the foregoing reasons, Dean Witter respectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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OFFICE OF THE CLERK

(6)

No. 01-800

In The

Supreme Court of the United States

KAREN HOWSAM, individually and as Trustee for the E. Richard Howsam, Jr. Irrevocable Life Insurance Trust dated May 14, 1982,

Petitioner,

v.

DEAN WITTER REYNOLDS, INC., a Delaware corporation,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

JOINT APPENDIX

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Aug. 8, 1997	Motion to Dismiss for Failure to Join an Indispensable Party
Aug. 8, 1997	Plaintiff's Response in Opposition to Defendants' Motion to Amend Order Staying Arbitration
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Aug. 9, 2001	Opinion

Client Service Agreement

The undersigned (the "Client") hereby retains, under the terms and conditions set forth herein, Dean Witter Reynolds Inc. ("Dean Witter"), and Dean Witter accepts such engagement.

---

1. Consulting Services

Dean Witter will provide the Client with the following services:

a. After receipt of appropriate information from and about the Client, as set forth in a completed Investment Plan Questionnaire and Client Profile, Dean Witter will (i) provide the Client with a Policy Statement of Investment Objectives and Guidelines, (ii) identify for the Client investment advisors deemed suitable for the Client from among those participating in the ACCESS program based upon the information made available by the Client and the advisors, including the advisors' Form ADV or, for advisors exempt from registration under the Investment Advisers Act of 1940, such other similar disclosure document as is satisfactory to Dean Witter, and (iii) provide the Client with copies of such identified advisors' Investment Advisor Profiles, discussed in paragraph 4 hereof, and copies of such advisors' Forms ADV, Part 2, or other disclosure documents (such Forms

ADV, Part 2 or other disclosure documents being hereinafter referred to as the "Advisors' Disclosure Documents") in compliance with Rule 204-3(a) of the Investment Advisers Act of 1940.

b. Dean Witter will pay one or more independent investment advisors (collectively herein the "Advisor") selected by the Client to manage the ACCESS brokerage account(s) which the Client has opened with Dean Witter (collectively herein the "Account").

c. Dean Witter will provide Quarterly Performance Measurement Summary reports with respect to the Account managed by the Advisor.

d. Dean Witter will periodically monitor the performance of the Advisor for purposes of determining whether the Advisor will continue to be included in the list of advisors participating in the ACCESS program.

---

2. Brokerage

As set forth in paragraph 7 hereof, Dean Witter will provide brokerage services to the Client with respect to the Account. Dean Witter will send confirmations of transactions executed by Dean Witter for the Account and prepare and supply account statements to the Client with respect to the Account.

---

3. Custody of Assets

Dean Witter will maintain custody of the cash, securities and other investments (the "Assets") in the Client's Account and will receive and credit to the Account all interest, dividends and other distributions received by Dean Witter on the Assets in the Account. Dean Witter is not responsible for custody of assets of the Client not in the Account.

. . .

---

4. The Advisor

The Client has selected the Advisor to direct the investment and reinvestment of the Assets in the Client's Account. The Client hereby engages the Advisor subject to the terms and conditions of this Agreement and the ACCESS Master Investment Advisors Agreement between the Advisor and Dean Witter, substantially in the form of Exhibit A attached hereto and made a part hereof, and on the basis of the Advisor's Investment Advisor Profile developed pursuant to the Master Investment Advisors Agreement and the Advisors' Disclosure Documents.

. . .

---

18. Governing Law

This Agreement shall be construed and enforced in accordance with the laws of the State of New York without reference to choice of law doctrine.

---

19. Arbitration Disclosures

- Arbitration is final and binding on the parties.
- The parties are waiving their right to seek remedies in court, including the right to jury trial.
- Pre-arbitration discovery is generally more limited than and different from court proceedings.
- The arbitrators' award is not required to include factual findings or legal reasoning and any party's right to appeal or to seek modification of rulings by the arbitrators is strictly limited. The panel of arbitrators will typically include a minority of arbitrators who were or are affiliated with the securities industry.

The Client agrees that all controversies between the Client and Dean Witter and/or any of its officers, directors, or employees, present or former, concerning or arising from (i) any account maintained with Dean Witter by the Client; (ii) any transaction involving Dean Witter and the Client, whether or not such transaction occurred in such

account or accounts; or (iii) the construction, performance or breach of this or any other agreement between us, whether such controversy arose prior to, on or subsequent to the date hereof, shall be determined by arbitration before any self-regulatory organization or exchange of which Dean Witter is a member. The Client may elect which of these arbitration forums shall hear the matter by sending a registered letter or telegram addressed to Dean Witter at 130 Liberty Street, New York, New York 10006, Attn: Law Department. If the Client fails to make such election before the expiration of five (5) days after receipt of a written request from Dean Witter to make such election, Dean Witter shall have the right to choose the forum. Any arbitration proceeding between Dean Witter and the Client shall be held at the location at which the selected forum regularly conducts such proceedings nearest to the Dean Witter office carrying the Client's accounts. The award of the arbitrator or a majority of the arbitrators shall be final. Judgment on the award rendered may be entered in any state or federal court having jurisdiction.

---

20. Miscellaneous

All paragraph headings in this Agreement are solely for convenience, and do not affect the meaning or interpretation of this Agreement.

The Client hereby acknowledges receipt of a copy of this Agreement which includes a pre-dispute arbitration clause at Section 19 and a copy of Dean Witter's Form ADV, Part II, or the Investment Consulting Services Disclosure Document and the Advisor's Disclosure Documents.

Notwithstanding anything to the contrary herein, the Client shall have the right to terminate this Agreement without penalty within five (5) business days of the execution of this Agreement.

The Client hereby notifies Dean Witter of the selection of the following Advisor(s) pursuant to the terms of this Agreement.

Avatar	343-57317-42
Advisor's Name	Account Number
Advisor's Name	Account Number
Advisor's Name	Account Number

1. _____ /s/ Karen Howsam
   Name of Client — Signature/Title

   _____ _____
   Name of Client (if more than one Client) — Signature/Title

   _____
   Date

   _____
   Client Address

2. Dean Witter Reynolds Inc.

   By: /s/ [Illegible]
   Signature of Branch Manager

   8/26/92
   Date

NATIONAL ASSOCIATION OF SECURITIES DEALERS

NASD Arbitration No. 97-01394

KAREN HOWSAM, INDIVIDUALLY AND AS TRUSTEE FOR THE E. RICHARD HOWSAM, JR. IRREVOCABLE LIFE INSURANCE TRUST DATED MAY 14, 1982,

Claimant,

vs.

DEAN WITTER REYNOLDS, INC., ROBERT P. HOWARD, and PAUL J. SILER,

Respondents.

AMENDED STATEMENT OF CLAIM

Claimant Karen Howsam, individually and as trustee for the E. Richard Howsam, Jr. Irrevocable Life Insurance Trust dated May 14, 1982 ("the Trust"), alleges as follows:

1. At all times relevant hereto, Karen Howsam was a resident of Denver, Colorado, and dealt with respondents Dean Witter Reynolds, Inc. ("DWR"), Robert P. Howard ("Howard") and Paul J. Siler ("Siler"), through DWR's office located at 4582 S. Ulster Street, Suite 300, Denver, Colorado.

2. On January 6, 1986, Ms. Howsam's husband, E. Richard Howsam, Jr., died. Ms. Howsam was left with a son, Ryan, then age 14, and a daughter, Jill, then age 8.

3. Mr. Howsam had been a principal in a company called Striker Petroleum. His partners in Striker Petroleum were Siler and Eric Siler.

4. Sometime prior to 1986, Siler had become a stockbroker. Siler subsequently became a registered representative and account executive with DWR.

5. After Mr. Howsam's death in January 1986, proceeds from insurance policies on his life were paid into the Trust. Ms. Howsam, Siler and Eric Siler were co-trustees of the Trust.

6. After Mr. Howsam's death, Ms. Howsam was introduced to Howard, a registered representative and account executive of DWR, and recommended that she use DWR to manage the Trust's and her funds. Ms. Howsam agreed to transfer the Trust's and her funds to DWR because DWR was well-known and respected and she believed DWR would act in the Trust's and her best interests.

7. Prior to Mr. Howsam's death, Ms. Howsam had no investment experience. She informed Howard and DWR that she wanted a conservative portfolio which would preserve principal and provide income for living expenses for the family and education expenses for the children.

8. In March 1986, Howard recommended, and Siler as co-trustee approved, the Trust's purchase of 202 units of Dean Witter Realty Income Partnership III, L.P. ("Income Partnership") at $495.00 per unit, for a total investment of $99,990. The units were purchased on March 3, 1986, through DWR Account No. 343-026761.

9. Also in March 1986, Howard recommended, and Siler as co-trustee approved, the Trust's purchase of 200 units of Century Properties Growth Fund XXII ("Century

Properties") at $1,000 each, for a total of $200,000. The purchase was made March 11, 1986, through DWR Account No. 343-026761.

10. On March 11, 1986, Howard recommended, and Siler as co-trustee approved, the Trust's [purchase of] 400 units at $500 each of Public Storage Properties XVII ("Public Storage"), for a total purchase price of $200,000.

11. Ms. Howsam also opened a personal account at DWR. Howard was the account executive for her personal account. Her account number was 343-026802.

12. In July 1986, Howard recommended that Ms. Howsam purchase 50 units of Dean Witter Realty Growth Properties, L.P. ("Growth Properties") at a price of $1,000 per unit, or a total of $50,000. The units were purchased on July 8, 1986. Siler is listed as Ms. Howsam's account executive for the purchase of Growth Properties, presumably because he received all or part of the account executive's commission.

13. Both Howard and Siler told Ms. Howsam that the limited partnerships were excellent investments which would provide good returns. They informed her that the limited partnerships would pay the Trust and Ms. Howsam income over a five to ten year period, at the end of which either the partnership assets would be sold or Ms. Howsam would sell her partnership interests. They informed her that she would be able to sell her partnership interests no later than 1996 for the amount she invested or more. They told her that the partnership investments were not risky.

14. Howard and Siler did not inform Ms. Howsam of the amount of commission they would receive on the sales of the limited partnership interests. Ms. Howsam was not aware that partnership sales involved higher commissions to account executives than were paid on other forms of investments. Moreover, Ms. Howsam was not informed that DWR account executives received higher commissions to sell DWR products such as Growth Properties and Income Properties.

15. Beginning in February 1988, according to the account statements for Ms. Howsam's personal accounts, Paul F. Vader, Jr. became Ms. Howsam's account executive. Although Ms. Howsam requested account statements for the Trust account, no statements were provided by DWR for the period prior to September 1992, when Mr. Vader opened an investment management "wrap" account for the Trust.

16. Ms. Howsam's personal account statements continued to show Ms. Howsam's interest in Growth Properties at $50,000 through the end of March 1992. Thereafter, account statements indicated that no value was available. However, through late 1994, Vader continually assured Ms. Howsam that she need not worry about the value of the partnerships and told her that they continued to be good investments.

CENTURY PROPERTIES GROWTH FUND XXII

17. Century Properties Growth Fund XXII was formed in October 1985. By the time respondents sold the Trust two hundred units for $200,000, it should have been apparent to DWR, which had a duty to review such

investments before recommending them to customers, that the fund was a fiasco in the making. The fund's activities since its inception in October 1985 consisted of buying properties in rapidly declining real estate markets. Moreover, by the time the units were sold to the Trust, other similar partnerships with the same general partner were experiencing declining performance. In addition to the declining performance, of which respondents either were or should have been aware, by March 1986, when the investment was recommended and sold to the Trust, respondents were or should have been aware that certain proposed tax legislation ultimately passed in the fall of 1986 posed serious threats to the economic value of real estate and would potentially have a serious negative impact on the fund. In particular, the proposed tax bill (HR 3838), would replace eighteen or nineteen year depreciation with thirty year depreciation and would take away other tax benefits of real estate ownership. Respondents did not disclose to Ms. Howsam that the fund was continuing to purchase properties in declining real estate markets or that passage of HR 3838 would potentially cause her investment to lose value. There was no disclosure to Ms. Howsam by respondents prior to the Trust's investment in the Fund that other similar funds with the same general partner were not performing well.

18. Through December 1993, the fund distributed only approximately $3,000 to the Trust. Had the Trust's $200,000 been invested at 8% [per] annum, compounded annually, it would now be worth approximately $466,000.00. Had it been invested in suitable conservative, liquid equities, it would be worth considerably

more. Not until its 1994 annual report did the fund disclose that it appeared that its investment objective of capital growth would not be attained and that investors would not receive all of their money back. Until that time, respondents had continued to assure Ms. Howsam that the Trust's investment was sound.

DEAN WITTER REALTY INCOME PARTNERSHIP III, L.P.

19. Respondents wore several hats in recommending and selling 202 units of Dean Witter Realty Partnership III, L.P. ("Income Partnership") to the Trust for $99,990.

20. The managing general partner of Income Partnership was Dean Witter Realty Income Properties III, Inc., an affiliate of DWR. The Income Partnership units were offered through DWR as the selling agent. Limited partnership units could only be purchased through a brokerage account maintained with DWR. DWR received up to 8% in commissions and 3% of the gross proceeds of the offering went to DWR as managing general partner as "acquisition fees." DWR further stood to profit from additional management fees and contemplated that its affiliates might earn development fees and real estate brokerage commissions on future real estate acquisitions and developments. Further, DWR contemplated receiving 10% of distributable cash from future operations of the Income Partnership. It also contemplated that it or its affiliates would receive additional fees for investment management, mortgage brokerage, insurance brokerage

or leasing services with respect to partnership investments. With the obvious conflict of interests in selling its own investment product, with a myriad of profit sources for DWR, and respondents' duty to recommend and sell to the Trust only suitable investments, respondents had a heightened fiduciary duty to the Trust.

21. Income Partnership was essentially a "blind pool," in that its offering documents did not identify specific properties which would be purchased by the limited partnership. The prospectus was dated February 12, 1986. The Trust's subscription was accepted March 31, 1986. By that time, it was or should have been clear to DWR, in its capacities both as managing general partner and investment adviser with a duty to its customers to recommend only suitable investments, that the downtrend in rents and property values was accelerating and more broad-based than initially thought. It was obvious, or was certainly becoming obvious, that the investors would be better served by return of the uninvested cash to the limited partners in lieu of further purchases. Because the projected success of the investment depended in large part upon increasingly high rents in the future, the clear trend by March 1986 and the months thereafter, required that DWR, as managing partner, refrain from pouring more money into the real estate market. It also required that DWR and the individual respondents, in their roles as brokers for the Trust, properly advise Ms. Howsam not to purchase the Income Partnership units or to sell them soon after the purchase.

22. Income Partnership was sold as an investment vehicle suitable for retirement accounts and trusts and as an economic, as opposed to tax shelter, investment.

23. DWR represented that the pending tax proposals should not have a significant impact upon an investment income partnership.

24. Through the end of 1996, the Trust received distributions from Income Partnership of approximately $72,000. Had the Trust's $99,990 been invested at 8%, compounded annually, it would now be worth approximately $233,000. Had it been invested in suitable conservative, liquid equities, it would be worth considerably more.

25. Through 1994, respondents, through Vader, continued to assure Ms. Howsam that the Income Partnership investment remained sound and would ultimately be profitable. By late 1994, Ms. Howsam had become frustrated with the overall performance of the Trust's and her individual portfolio and moved all of her accounts from DWR.

PUBLIC STORAGE PROPERTIES XVII

26. Public Storage Properties XVIII, [sic] Ltd., was a limited partnership which, in a reorganization transaction completed on September 16, 1991, became Public Storage Properties XVIII, Inc., a real estate investment trust organized as a California corporation. Although the corporation's Form 10-K states that the partnership offered units of limited partnership interests to the public in September 1986, the Trust purchased 400 units at $500 each, for a total of $200,000, on March 12, 1986. While Public Storage was less leveraged and therefore a more conservative real estate-related investment than the other limited partnerships sold to the Trust and Ms. Howsam by

[respondents], the investment of $200,000 in another liquid real estate-related partnership was unsuitable in light of the circumstances and investment objectives of the Trust.

27. Ms. Howsam believes, subject to future verification, that the Trust will have recovered most of its $200,000 investment during the 11 years since the purchase of Public Storage units. However, had the Trust's $200,000 been invested at [8] percent, compounded annually, it would now be worth approximately $466,000. Had it been invested in suitable conservative, liquid equities, it would be worth considerably more.

DEAN WITTER REALTY GROWTH PROPERTIES LP

28. Dean Witter Realty Growth Properties, L.P. ("Growth Properties") is a limited partnership formed in 1985. Its managing general partner is Dean Witter Realty Growth Properties, Inc., which is wholly owned by DWR. The Growth Properties units were sold only through DWR.

29. The DWR conflicts of interest, Ms. Howsam's lack of investment experience, and her relationship with Siler, her husband's business partner and co-trustee of the Trust, imposed on respondents a high degree of fiduciary responsibility to recommend and sell to Ms. Howsam only suitable investments.

30. Ms. Howsam's investment of $50,000 in Growth Properties was accepted by the managing general partner on August 6, 1986. By that time, it had become even more obvious that real estate markets were in an accelerating

decline and that investors would have been better served by return of their uninvested funds.

31. Ms. Howsam is unable to determine her return on Growth Properties at this time. However, Ms. Howsam's $50,000, invested at 8%, compounded annually, would have grown to approximately $116,500 by now. Had it been invested in suitable conservative, liquid equities, it would be worth considerably more. Not until late 1994 or later was it disclosed to Ms. Howsam that it was not likely that she would recover her investment in Growth Properties.

CLAIM FOR BREACH OF FIDUCIARY DUTIES

32. Ms. Howsam invested with DWR, Siler, and Howard because she viewed them as reputable investment advisers and brokers. In addition, she had particular trust and confidence in Siler because of his business and personal relationship with her husband and the fact that he was a co-trustee of the Trust. As a result of the relationship of trust and confidence between Ms. Howsam and the respondents, respondents owed Ms. Howsam the duties of good faith, fair dealing, reasonable care and integrity that govern fiduciaries.

33. Brokerage firms and brokers owe fiduciary duties to their customers. *See, e.g., Conway v. Icahn & Co.*, 16 F.3d 504 (2nd Cir. 1994) (finding that the relationship between a stockbroker and the customer is that of principal and agent and is fiduciary in nature). *See, also, Paine, Webber, Jackson & Curtis, Inc. v. Adams*, 718 P.2d 508 (Colo. 1986).

34. A fiduciary relationship exists when one person is under a duty to act for or give advice for the benefit of another upon matters within the scope of the relationship. A fiduciary relationship can arise when one party occupies a superior position relative to another. It may be based upon a professional, business, or personal relationship. *Moses v. Diocese of Colorado*, 863 P.2d 310 (Colo. 1993). DWR, Howard and Siler knew that Ms. Howsam was recently widowed, was responsible for the care of two minor children, had no prior investment experience, and relied entirely upon them to manage her funds and the Trust's funds prudently and to recommend and sell only investments suitable to her and the Trust's investment objectives and needs. This respondents did not do.

35. By recommending and selling to Ms. Howsam and the Trust limited partnership investments totalling $550,000, all of which were heavily loaded with commissions and other fees, all of which were heavily dependent upon the performance of real estate markets, and all of which were illiquid and highly risky investments, respondents breached their duty to recommend and sell only suitable investments.

36. It is well-settled that a securities sales person:

> . . . cannot recommend a security unless there is an adequate and reasonable basis for such recommendation. He must disclose facts which he knows and those which are reasonably ascertainable. By his recommendation he implies that a reasonable investigation has been made and that his recommendation rests on the conclusions based on such investigation. Where the salesman lacks essential information about a security, he should disclose this as well as the risks which arise from this lack of information.

Hanley v. SEC, 415 F.2d 589, 597 (2nd Cir. 1969). Respondents breached their fiduciary duty to Ms. Howsam and the Trust to investigate the status of the limited partnerships recommended and sold at or near the times of the sales. As discussed above, respondents either failed to make such investigations or deliberately ignored the declining real estate market and recent poor performance of similar limited partnerships.

37. Because of reassurances by respondents that her limited partnership investments were not in jeopardy, Ms. Howsam did not discover until late 1994 that the limited partnership investments were in trouble. The fiduciary relationship between Ms. Howsam and the Trust, on the one hand, and respondents, on the other, imposed upon respondents a duty to monitor the investments and affirmatively to advise the client as to any changes in circumstances. Respondents' failure to advise Ms. Howsam and the Trust that the limited partnership investments were no longer anticipated to perform as originally represented tolled the running of any statutes of limitation. *Vucinich v. Paine, Webber, Jackson & Curtis, Inc.*, 803 F.2d 454 (9th Cir. 1986).

38. When considering whether investors reasonably could have discovered the facts giving rise to their claims, the arbitrators should consider that a fiduciary relationship creates a climate of trust in which "facts which would ordinarily require investigation may not excite suspicion, and the same degree of diligence is not required." *Lucas v. Abbott*, 198 Colo. 477, 481, 601 P.2d

1376, 1379 (1979). Confidential relationships may cause a person "to relax the care and vigilance [he or she] would and should have ordinarily exercised in dealing with a stranger." *Ralston Oil & Gas Co. v. July Corp.*, 719 P.2d 334, 338 (Colo. App. 1985). Reliance on representations made in the context of the fiduciary relationship therefore reduces the investor's duty of inquiry.

39. Respondents possess superior knowledge, judgment, skill and experience in securities investments, in contrast to Ms. Howsam's lack of meaningful knowledge and understanding of securities investments and the substantial risk to which her and the Trust's accounts were exposed. Respondents further had superior access to information concerning the limited partnership investments and the risks attendant thereto. Such information was not readily accessible by Ms. Howsam.

40. Because of the fiduciary relationship, respondents owed Ms. Howsam and the Trust a duty to protect and further their interests over respondents' interest in generating commissions, fees and profits for themselves.

41. Because of the fiduciary relationship between Ms. Howsam and the Trust, on the one hand, and the respondents, on the other, Ms. Howsam and the Trust reasonably relied to their detriment on respondents' superior knowledge, skill, judgment and experience in recommending investments.

42. Respondents knowingly and deliberately breached their fiduciary duties to Ms. Howsam and the Trust by misrepresenting or ignoring the risks of the limited partnership investments, failing to conduct due diligence investigations of the investments at or about the

time the investments were made, and investing in unsuitable securities in total disregard for claimant's best interests, solely for the purpose of enriching themselves, and by concealing the unsuitable nature of the transactions without making requisite disclosures to claimant.

43. Respondents' breaches of fiduciary duty caused Ms. Howsam and the Trust damages of $1,000,000, including the principal invested and a reasonable rate of return on the unsuitable limited partnership investments, less amounts received from the investments.

WHEREFORE, claimant requests actual damages, together with pre-judgment interest or, if appropriate, model portfolio damages, attorneys' fees, costs, and such other relief as the arbitrators deem proper.

Dated this 10th day of April, 1997.

PENDLETON, FRIEDBERG,
WILSON & HENNESSEY, P.C.

By: /s/ Alan C. Friedberg
Alan C. Friedberg
Attorneys for Claimant
303 East 17th Avenue,
Suite 1000
Denver, Colorado 80203
Telephone: (303) 839-1204
Facsimile: (303) 831-0786

UNIFORM SUBMISSION AGREEMENT

NASD Arbitration

In the Matter of the Arbitration Between
Name(s) of Claimant(s)

Karen Howsam, Individually and as Trustee for the E. Richard Howsam, Jr. Irrevocable Life Insurance Trust Dated May 14, 1982,

and

Name(s) of Respondent(s)

Dean Witter Reynolds, Inc., Robert P. Howard, and Paul J. Siler

1. The undersigned parties hereby submit the present matter in controversy, as set forth in the attached statement of claim, answers, and all related counterclaims and/or third-party claims which may be asserted, to arbitration in accordance with the Constitution. By-Laws, Rules, Regulations, and/or Code of Arbitration Procedure of the sponsoring organization.

2. The undersigned parties hereby state that they have read the procedures and rules of the sponsoring organization relating to arbitration.

3. The undersigned parties agree that in the event a hearing is necessary, such hearing shall be held at a time and place as may be designated by the Director of Arbitration or the arbitrator(s). The undersigned parties further agree and understand that the arbitration will be conducted in accordance with the Constitution, By-Laws, Rules, Regulations, and/or Code of Arbitration Procedure of the sponsoring organization.

4. The undersigned parties further agree to abide by and perform any award(s) rendered pursuant to this Submission Agreement and further agree that a judgment and any interest due thereon, may be entered upon such award(s) and, for these purposes, the undersigned parties hereby voluntarily consent to submit to the jurisdiction of any court of competent jurisdiction which may properly enter such judgment.

5. IN WITNESS WHEREOF, the parties hereto have signed and acknowledged the foregoing Submission Agreement.

CLAIMANT(S) SIGNATURES(S)

Karen Howsam, Individually

Karen Howsam, Individually

FOR CLAIMANTS WHO ARE INDIVIDUALS*

STATE OF)
: ss:
COUNTY OF)

On the _____ day of _____, 1997, before me personally appeared Karen Howsam, Individually to me known and known to me to be the person(s) who executed the foregoing instrument, and (she_) acknowledged to me that (she_) executed the same.

Notary Public

My commission expires:

* *A corporate claimant is required to execute an acknowledgement in the form approved by the state in which it has its principal office. If assistance is required, please contact the Director of Arbitration.*

CALIFORNIA ALL-PURPOSE ACKNOWLEDGMENT

State of California

County of Santa Barbara

On 04-15-97 before me,
Date

Tatum Sarinana, Notary Public
Name and Title of Officer (e.g., "Jane Doe, Notary Public")

personally appeared Karen J. Howsam.
Name(s) of Signer(s)

~~[ ] personally known to me~~ – **OR** – [✓] proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/~~are~~ subscribed to the within instrument and acknowledged to me that ~~he~~/she/~~they~~ executed the same in ~~his~~/her/~~their~~ authorized capacity(~~ies~~), and that by ~~his~~/her/~~their~~ signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

/s/ Tatum Sarinana
Signature of Notary Public

[SEAL]
TATUM SARINANA
Commission #11120
Notary Public – California
Santa Barbara County
My Comm. Expires Sep 23, 2000

OPTIONAL

Though the information below is not required by law, it may prove valuable to persons relying on the document and could prevent fraudulent removal and reattachment of this form to another document.

Description of Attached Document

Title or Type of Document: 04-15-97 – uniform submission agreement

Document Date: 04-15-97 Number of Pages: 1

Signer(s) Other Than Named Above: None

Capacity(ies) Claimed by Signer(s)

Signer's Name Karen J Howsam

[✓] Individual
[ ] Corporate Officer
Title(s): _____
[ ] Partner – [ ] Limited [ ] General
[ ] Attorney-in-Fact

[ ] Trustee
[ ] Guardian or Conservator
[ ] Other: _____

_____

Signer is Representing:

* * *

_____

UNIFORM SUBMISSION AGREEMENT

NASD Arbitration

In the Matter of the Arbitration Between
Name(s) of Claimant(s)

Karen Howsam, Individually and as Trustee for the E. Richard Howsam, Jr. Irrevocable Life Insurance Trust Dated May 14, 1982,

and

Name(s) of Respondent(s)

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1. The undersigned parties hereby submit the present matter in controversy, as set forth in the attached statement of claim, answers, and all related counterclaims and/or third-party claims which may be asserted, to arbitration in accordance with the Constitution. By-Laws, Rules, Regulations, and/or Code of Arbitration Procedure of the sponsoring organization.

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4. The undersigned parties further agree to abide by and perform any award(s) rendered pursuant to this Submission Agreement and further agree that a judgment and any interest due thereon, may be entered upon such award(s) and, for these purposes, the undersigned parties hereby voluntarily consent to submit to the jurisdiction of any court of competent jurisdiction which may properly enter such judgment.

5. IN WITNESS WHEREOF, the parties hereto have signed and acknowledged the foregoing Submission Agreement.

CLAIMANT(S) SIGNATURES(S)

Karen Howsam, Trustee

Karen Howsam, Trustee for the
E. Richard Howsam, Jr. Irrevocable Life
Insurance Trust Dated May 14, 1982

FOR CLAIMANTS WHO ARE INDIVIDUALS*

STATE OF)
: ss:
COUNTY OF)

On the _____ day of _____, before me personally appeared _____ to me known and known to me to be the person(s) who executed the foregoing instrument, and (_____he_____) acknowledged to me that (_____he_____) executed the same.

Notary Public

** A corporate claimant is required to execute an acknowledgement in the form approved by the state in which it has its principal office. If assistance is required, please contact the Director of Arbitration.*

CALIFORNIA ALL-PURPOSE ACKNOWLEDGMENT

State of California

County of Santa Barbara

On 04-16-97 before me,
Date

Tatum Sarinana, Notary Public
Name and Title of Officer (e.g., "Jane Doe, Notary Public")

personally appeared Karen J. Howsam – Trustee.
Name(s) of Signer(s)

~~[ ] personally known to me~~ – **OR** – [✓] proved to me on the basis of satisfactory evidence to be the person(~~s~~) whose name(~~s~~) is/~~are~~ subscribed to the within instrument and acknowledged to me that ~~he~~/she/~~they~~ executed the same in ~~his~~/her/~~their~~ authorized capacity(~~ies~~), and that by ~~his~~/her/~~their~~ signature(~~s~~) on the instrument the person(~~s~~), or the entity upon behalf of which the person(~~s~~) acted, executed the instrument.

WITNESS my hand and official seal.

/s/ Tatum Sarinana
Signature of Notary Public

[SEAL]
TATUM SARINANA
Commission #11120
Notary Public – California
Santa Barbara County
My Comm. Expires Sep 23, 2000

OPTIONAL

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Title or Type of Document: Uniform Submission Agreement

Document Date: 04-16-97 Number of Pages: 1

Signer(s) Other Than Named Above: None

Capacity(ies) Claimed by Signer(s)

Signer's Name Karen J. Howsam

[ ] Individual
[ ] Corporate Officer
Title(s): _____
[ ] Partner – [ ] Limited [ ] General
[ ] Attorney-in-Fact
[✓] Trustee

[ ] Guardian or Conservator
[ ] Other: _____

Signer is Representing:

* * *

UNIFORM SUBMISSION AGREEMENT

NASD Arbitration

In the Matter of the Arbitration Between
Name(s) of Claimant(s)

Karen Howsam, Individually and as Trustee for the E. Richard Howsam, Jr. Irrevocable Life Insurance Trust Dated May 14, 1982,

and

Name(s) of Respondent(s)

Dean Witter Reynolds, Inc., Robert P. Howard, and Paul J. Siler

1. The undersigned parties hereby submit the present matter in controversy, as set forth in the attached statement of claim, answers, and all related counterclaims and/or third-party claims which may be asserted, to arbitration in accordance with the Constitution, By-Laws, Rules, Regulations, and/or Code of Arbitration Procedure of the sponsoring organization.

2. The undersigned parties hereby state that they have read the procedures and rules of the sponsoring organization relating to arbitration.

3. The undersigned parties agree that in the event a hearing is necessary, such hearing shall be held at a time and place as may be designated by the Director of Arbitration or the arbitrator(s). The undersigned parties further agree and understand that the arbitration will be conducted in accordance with the Constitution, By-Laws, Rules, Regulations, and/or Code of Arbitration Procedure of the sponsoring organization.

4. The undersigned parties further agree to abide by and perform any award(s) rendered pursuant to this Submission Agreement and further agree that a judgment and any interest due thereon, may be entered upon such award(s) and, for these purposes, the undersigned parties hereby voluntarily consent to submit to the jurisdiction of any court of competent jurisdiction which may properly enter such judgment.

5. IN WITNESS WHEREOF, the parties hereto have signed and acknowledged the foregoing Submission Agreement.

CLAIMANT(S) SIGNATURES(S)

/s/ David A. Chubb, Co-Trustee
David A. Chubb, Co-Trustee for the
E. Richard Howsam, Jr.
Irrevocable Life Insurance Trust
Dated May 14, 1982

FOR CLAIMANTS WHO ARE INDIVIDUALS*

STATE OF)
: ss:
COUNTY OF)

On the _____ day of _____, _____, before me personally appeared _____ to me known and known to me to be the person(s) who executed the foregoing instrument, and (_____he_____) acknowledged to me that (_____he_____) executed the same.

Notary Public

** A corporate claimant is required to execute an acknowledgement in the form approved by the state in which it has its principal office. If assistance is required, please contact the Director of Arbitration.*

CALIFORNIA ALL-PURPOSE ACKNOWLEDGMENT

State of California

County of Santa Barbara

On 04-16-97 before me,
Date

Tatum Sarinana, Notary Public
Name and Title of Officer (e.g., "Jane Doe, Notary Public")

personally appeared David A. Chubb – Co-trustee.
Name(s) of Signer(s)

~~[ ] personally known to me~~ – **OR** – [✓] proved to me on the basis of satisfactory evidence to be the person(**s**) whose name(**s**) is/~~are~~ subscribed to the within instrument and acknowledged to me that he/~~she/they~~ executed the same in his/~~her/their~~ authorized capacity(~~ies~~), and that by his/~~her/their~~ signature(**s**) on the instrument the person(**s**), or the entity upon behalf of which the person(**s**) acted, executed the instrument.

WITNESS my hand and official seal.

/s/ Tatum Sarinana
Signature of Notary Public

[SEAL]
TATUM SARINANA
Commission #11120
Notary Public – California
Santa Barbara County
My Comm. Expires Sep 23, 2000

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Capacity(ies) Claimed by Signer(s)

Signer's Name David A. Chubb

[ ] Individual
[ ] Corporate Officer
Title(s): _____
[ ] Partner – [ ] Limited [ ] General
[ ] Attorney-in-Fact
[ ] Trustee

[ ] Guardian or Conservator
[✓] Other: Co-trustee

Signer is Representing:

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 97-WM- 1463

DEAN WITTER REYNOLDS INC., a Delaware corporation,

Plaintiff,

v.

KAREN HOWSAM, individually and as trustee for the E. RICHARD HOWSAM, JR. IRREVOCABLE LIFE INSURANCE TRUST DATED MAY 14, 1982,

Defendants.

AMENDED VERIFIED COMPLAINT

(Filed July 18, 1997)

Plaintiff Dean Witter Reynolds Inc. ("Dean Witter") hereby states and alleges as follows:

JURISDICTION AND VENUE

1. Dean Witter is a corporation duly organized and existing under the laws of the State of Delaware, with its principal place of business in the State of New York. Dean Witter is a registered broker/dealer licensed to conduct business in the State of Colorado. Dean Witter maintains branch offices in Denver, Colorado.

2. On information and belief, Karen Howsam ("Howsam"), individually, is a citizen of either the State of California, residing in Santa Barbara County, or the State of Colorado, residing in Grand County, or both.

3. Howsam is a trustee ("Trustee") for the E. Richard Howsam, Jr. Irrevocable Life Insurance Trust Dated May 14, 1982 ("the Trust"). On information and belief, the situs of the Trust, and therefore its place of "citizenship," is either in the State of California, County of Santa Barbara or the State of Colorado, Grand County.

4. Complete diversity exists among the parties. Therefore, this Court has subject matter jurisdiction over this controversy pursuant to 28 U.S.C. § 1332(a)(1) and 28 U.S.C. § 2201. The amount in controversy exceeds $75,000, exclusive of interest and costs.

5. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b). The events giving rise to the claims occurred in Colorado, and most of the witnesses and documents (to the extent they still exist) are located in Colorado. Personal jurisdiction over the Defendants is proper in that Defendants transacted business with plaintiffs in Colorado, including by signing in Colorado the arbitration agreement which is the subject of this litigation.

FACTUAL ALLEGATIONS

6. On or about June 11, 1997, the National Association of Securities Dealers, Inc. ("NASD") notified Dean Witter that Defendants had commenced an arbitration proceeding against Dean Witter, Robert Howard, and Paul J. Siler (the "Arbitration"). A true and correct copy of the original Statement of Claim, dated March 7, 1997, is attached as Exhibit "A" to this Amended Verified Complaint ("the Original Statement of Claim"). A true and correct copy of the Amended Statement of Claim, dated

April 10, 1997, is attached as Exhibit "B" to this Amended Verified Complaint ("the Amended Statement of Claim").

7. As evidenced by the Amended Statement of Claim, Defendants seek to arbitrate claims arising out of the purchase of investments in 1986, more than six years before the date they filed the Original Statement of Claim with the NASD. The Original Statement of Claim is stamped "Received March 12, 1997 " by the NASD.

8. Dean Witter and Defendants are parties to an arbitration agreement. Consistent with that agreement, Defendants filed their Arbitration with the NASD.

9. At the time Defendants filed their Original Statement of Claim with the NASD, they also signed and filed a Uniform Submission Agreement, attached to this Amended Verified Complaint as Exhibit "C." Under the terms of the Uniform Submission Agreement, Defendants agreed to arbitrate their claims and disputes with Plaintiff in accordance with the rules set forth in the NASD Code of Arbitration Procedure (the "NASD Code").

10. The NASD Code prohibits the submission of stale claims to arbitration. Rule 10304 of the NASD Code specifically states:

> No dispute, claim, or controversy shall be eligible for submission to arbitration under this Code where six (6) years have elapsed from the occurrence or event giving rise to the act or the dispute, claim or controversy. This Rule shall not extend applicable statutes of limitations, nor shall it apply to any case which is directed to arbitration by a court of competent jurisdiction.

11. A cursory review of Defendants' Amended Statement of Claim demonstrates that their claims arise entirely from the purchases of various securities in 1986, more than ten years ago, and well beyond the outside limit of eligibility established by Rule 10304.

12. To be arbitrable, a controversy must satisfy the eligibility requirement of Rule 10304, which is a jurisdictional prerequisite. Rule 10304 limits the scope of the parties' contractual agreement to arbitrate. The parties may arbitrate only disputes and claims arising out of transactions made within six years before the filing of a statement of claim.

13. Because this controversy and all of the claims asserted by Defendants in their Amended Statement of Claim arise from purchases of investments made by Defendants before March 12, 1991, the dispute is ineligible for arbitration under Rule 10304.

COUNT I
(INJUNCTIVE RELIEF)

14. Dean Witter incorporates the allegations of paragraphs 1 through 13 above by reference.

15. Defendants' claims are ineligible for arbitration under Rule 10304 of the NASD Code.

16. As determined by the United States Court of Appeals for the Tenth Circuit precedent, Rule 10304 (formerly Section 15) of the NASD Code is a jurisdictional eligibility requirement that must be applied by the courts to bar arbitration of claims based on transactions that took place more than six years before the filing of a

statement of claim. *See Cogswell v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 78 F.3d 474, 478-81 (10th Cir. 1996).

17. Because the Amended Statement of Claim exclusively concerns claims relating to the purchases of securities made by Defendants in 1986, more than six years before they filed their Original Statement of Claim, it is substantially likely that Dean Witter will prevail on the merits.

18. Irreparable harm will ensue if Dean Witter is required to arbitrate ineligible, non-arbitrable claims. Dean Witter will be forced to expend significant time and resources needlessly and irretrievably to defend themselves against claims that they never agreed to arbitrate.

19. If Dean Witter is forced to arbitrate ineligible, non-arbitrable claims, the potential injury to Plaintiff outweighs any possible harm to Defendants.

20. Plaintiff has no adequate remedy at law. A preliminary and permanent injunction would prevent the needless expense of the parties' time and resources and therefore serve the public interest. Furthermore, protecting Dean Witter's right to abide by the contract terms agreed to in the arbitration agreement also serves the public interest.

21. Dean Witter's Answer to the Statement of Claim currently is due on Tuesday, July 22, 1997, and discovery and hearings will follow the filing of the Statement of Answer. A preliminary injunction therefore is necessary to maintain the status quo.

COUNT II
(DECLARATORY RELIEF)

22. Plaintiff incorporates paragraphs 1 through 21 above by reference.

23. A present and actual controversy exists between Plaintiff and Defendants concerning the arbitrability of claims arising out of investments purchased by Defendants prior to March 12, 1991. Pursuant to 28 U.S.C. § 2201, Plaintiff requests that the Court declare the rights and other relations among the parties, and enter a declaration that Defendants' claims arising from investments Defendants purchased prior to March 12, 1991 are ineligible for arbitration.

WHEREFORE, Plaintiff respectfully requests that:

1. The Court enter a preliminary injunction enjoining Defendants, pending entry of a final determination in this action, from proceeding with the prosecution, in arbitration or otherwise, of any claims arising out of investments Defendants purchased more than six years prior to filing their Original Statement of Claim (investments purchased prior to March 12, 1991) against and [sic] Dean Witter, or any of Dean Witter's officers, directors or employees, present or former;

2. The Court enter a permanent injunction enjoining Defendants from proceeding with the prosecution, in arbitration or otherwise, of any claims arising out of investments Defendants purchased more than six years prior to filing their Original Statement of Claim (investments purchased prior to March 12, 1991) against and

[sic] Dean Witter, or any of Dean Witter's officers, directors or employees, present or former; and

3. The Court enter an Order declaring that the Defendants' claims arising out of investments purchased prior to March 12, 1991 are ineligible for arbitration.

4. The Court grant such other and further relief as the Court deems just and proper.

Dated: July 17 1997.

DAVIS, GRAHAM & STUBBS LLP

By: /s/ Lisa S. Kahn
Lisa S. Kahn
370 Seventeenth Street,
Suite 4700
Denver, Colorado 80202
Telephone: (303) 892-9400
Facsimile: (303) 893-1379
D.C. Box No. 3

ATTORNEYS FOR PLAINTIFF
DEAN WITTER REYNOLDS INC.

Plaintiff's Address:

Dean Witter Reynolds Inc.
130 Liberty Street, 27th Floor
New York, NY 10006

VERIFICATION

I, James Foley, verify that I am a Senior Vice President and Branch Office Manager of Dean Witter Reynolds Inc., employed at the Denver Tech Center branch office located in Denver, Colorado, and that the facts set forth in the foregoing Amended Verified Complaint are true

and correct to the best of my knowledge, information, and belief. I understand that false statements herein are subject to the penalties of 28 U.S.C. § 1746 relating to unsworn declarations to authorities.

Dated: 17th day of July, 1997.

DEAN WITTER REYNOLDS INC.

By: /s/ James Foley
James Foley, SENIOR VICE PRESIDENT AND BRANCH OFFICE MANAGER

NASD Code of Arbitration Procedures

10101. Matters Eligible for Submission. This Code of Arbitration Procedure is prescribed and adopted pursuant to Article VII, Section 1(a)(iv) of the By-Laws of the Association for the arbitration of any dispute, claim, or controversy arising out of or in connection with the business of any member of the Association, or arising out of the employment or termination of employment of associated person(s) with any member, with the exception of disputes involving the insurance business of any member which is also an insurance company:

(a) between or among members;

(b) between or among members and associated persons;

(c) between or among members or associated persons and public customers, or others; and

(d) between or among members, registered clearing agencies with which the Association has entered into an agreement to utilize the Association's arbitration facilities and procedures, and participants, pledgees, or other persons using the facilities of a registered clearing agency, as these terms are defined under the rules of such a registered clearing agency.

[Amended eff. May 7, 1991; Oct. 1, 1993; amended by SR-NASD-98-86 eff. Nov. 19, 1998.]

10304. Time Limitation Upon Submission. No dispute, claim, or controversy shall be eligible for submission to arbitration under this Code where six (6) years have elapsed from the occurrence or event giving rise to the act or dispute, claim or controversy. This Rule shall not extend applicable statutes of limitations, nor shall it apply to any case which is directed to arbitration by a court of competent jurisdiction.

[Amended eff. Oct. 1, 1984.]

10324. Interpretation of Provisions of Code and Enforcement of Arbitrator Rulings. The arbitrators shall be empowered to interpret and determine the applicability of all provisions under this Code and to take appropriate action to obtain compliance with any ruling by the arbitrator(s). Such interpretations and actions to obtain compliance shall be final and binding upon the parties.

[Amended eff. Nov. 16, 1992.]

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(4)

No. 01-800

Supreme Court, U.S.
FILED
MAY 28 2002
OFFICE OF THE CLERK

In The

Supreme Court of the United States

KAREN HOWSAM, individually and as Trustee for the E. Richard Howsam, Jr. Irrevocable Life Insurance Trust dated May 14, 1982,

Petitioner,

v.

DEAN WITTER REYNOLDS, INC., a Delaware corporation,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF FOR THE PETITIONER

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55 pages

QUESTION PRESENTED

The parties agreed to arbitrate "all controversies" between them arising out of the petitioner's securities accounts with respondent, including "the construction . . . of this or any other agreement between" them.

The question presented is whether a court or the arbitrators should decide if claims are eligible for arbitration under a self-regulatory organization's arbitration code provision that "[n]o dispute, claim, or controversy shall be eligible for submission to arbitration under this Code where six (6) years have elapsed from the occurrence or event giving rise to the act or dispute, claim or controversy."

THE PARTIES

The parties are all listed in the caption of this case. Petitioner is not a corporation.

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OPINIONS BELOW

The district court's order (Walker, D.J.), dated June 28, 1999, granting petitioner's motion to dismiss for lack of subject matter jurisdiction is unpublished. App. 31. The opinion of the Tenth Circuit Court of Appeals is published at 261 F.3d 956 (10th Cir. 2001). App. 1.

STATEMENT OF JURISDICTION

The Tenth Circuit's opinion and judgment was entered August 9, 2001. App. 1. Petitioner did not petition for rehearing or for rehearing *en banc* prior to filing her petition. 10th Cir. R. 35.1(B). The Petition for Writ of Certiorari was filed on November 6, 2001, and granted by this Court on February 25, 2002. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND ARBITRATION CODE PROVISIONS INVOLVED IN THIS CASE

(1) The Federal Arbitration Act, 9 U.S.C. § 1, *et seq.*, specifically, § 2, provides,

> A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such

grounds as exist at law or in equity for the revocation of any contract.

(2) Section 10304[1] of the NASD Code of Arbitration Procedure provides:

> **Time Limitation Upon Submission.** No dispute, claim, or controversy shall be eligible for submission to arbitration under this Code where six (6) years have elapsed from the occurrence or event giving rise to the act or dispute, claim or controversy. This Rule shall not extend applicable statutes of limitations, nor shall it apply to any case which is directed to arbitration by a court of competent jurisdiction.

(3) Section 10324[2] of the NASD Code of Arbitration Procedure provides:

> **Interpretation of Provisions of Code and Enforcement of Arbitrator Rulings.** The arbitrators shall be empowered to interpret and determine the applicability of all provisions under this Code and to take appropriate action to obtain compliance with any ruling by the arbitrator(s). Such interpretations and actions to obtain compliance shall be final and binding upon the parties.

---

[1] Effective July 1, 1996, the NASD initiated a new numbering system under which NASD Code § 15 was changed to NASD Code § 10304. The text of § 10304 is identical to the text of § 15, and, therefore, the case law interpreting § 15 applies equally to § 10304.

[2] Effective July 1, 1996, the NASD initiated a new numbering system under which NASD Code § 35 was changed to NASD Code § 10324. The text of § 10324 is identical to the text of § 35, and, therefore, the case law interpreting § 35 applies equally to § 10324.

STATEMENT OF THE CASE

After her husband's death in 1986, petitioner Karen Howsam ("Howsam") opened securities accounts with respondent Dean Witter Reynolds, Inc. ("DWR") for herself and for a family trust. DWR and its registered representative purchased a number of limited partnerships for the accounts at a total cost of about $550,000. The partnerships were represented to Howsam to be long term investments which would provide income and growth in value for five to ten year periods, after which either the partnerships would have sold their properties or Howsam would sell her partnership interests. Through March 1992, the partnerships were valued on monthly account statements at their purchase costs. After March 1992, the partnerships were not valued at all on the account statements, but DWR's registered representative repeatedly assured Howsam that they continued to be good and valuable investments.

In late 1994, Howsam began to receive correspondence from the partnerships alerting her to the fact that they had suffered serious losses in value since their purchases in 1986. Howsam subsequently closed the DWR accounts.

The DWR customer agreement Howsam signed in 1992 contained an arbitration clause, requiring her to arbitrate disputes with DWR. In March 1997, Howsam commenced arbitration by filing uniform submission agreements (J.A. 24-38) and a statement of claim (J.A. 10-23) alleging breaches of fiduciary duties by DWR and its registered representatives with the National Association of Securities Dealers, Inc. ("NASD"). The breaches included failure to recommend and sell Howsam investments which

were suited to her and the trust's investment objectives, failure to advise Howsam that the investments were or had become unsuitable for her and the trust, and failure to monitor the investments and to keep Howsam apprised of their value so that she could make informed decisions with respect to their sale or retention prior to late 1994.

In July 1997, DWR filed a complaint in the district court (J.A. 39-46) seeking declaratory relief and to enjoin the arbitration from proceeding. DWR asserted jurisdiction under 28 U.S.C. §§ 1332(a)(1), 1391(b), and 2201. DWR contended that the events giving rise to the arbitration claims occurred more than six years prior to the commencement of arbitration, thus making them ineligible for arbitration pursuant to NASD Code of Arbitration Procedure (the "Code") § 10304.

By order dated June 28, 1999, the district court granted Howsam's motion to dismiss DWR's complaint for lack of subject matter jurisdiction, holding that the eligibility issues presented by DWR's complaint must be determined by the arbitrators rather than the court. The district court found that the operative agreement to arbitrate was contained in an August 1992 Client Service Agreement (the "1992 Agreement") which provided, in relevant part,

> The Client agrees that all controversies between the Client and Dean Witter ... concerning or arising from (i) any account maintained with Dean Witter by the Client; (ii) any transaction involving Dean Witter and the Client ... ; or (iii) the construction, performance or breach of this or any other agreement between us ... shall be determined by arbitration ....

J.A. 6-7.

The 1992 Agreement further provided that it was governed by the law of the State of New York. J.A. 6. Relying on *Smith Barney Shearson Inc. v. Sacharow*, 689 N.E.2d 884 (N.Y. 1997), and *Cogswell v. Merrill Lynch, Pierce, Fenner & Smith*, 78 F.3d 474 (10th Cir. 1996), the district court determined that "the totality of this broad language [the arbitration provision of the 1992 Agreement] clearly and unmistakably evidences the parties' intention to have *all* disputed issues, including those of eligibility of arbitration pursuant to Section [10304], arbitrated and not judicially determined." App. 34 (emphasis in the original).

The Tenth Circuit reversed, concluding that "the district court erred in finding that the parties 'clearly and unmistakably' agreed to allow an arbitrator, rather than the courts, to decide whether specific disputes are arbitrable." App. 2.

In *Cogswell*, in which the Tenth Circuit had earlier held that courts rather than arbitrators should decide § 10304 eligibility issues, the court specifically stated that because the customer agreement was to be "construed in accordance with the laws of the State of New York," it applied New York's "principles of contract interpretation to determine the meaning of the agreement," *Id.* at 478, citing *First Options of Chicago v. Kaplan*, 514 U.S. 938 (1995). After *Cogswell* was decided, the highest court in New York decided *Sacharow*, in which it held that an arbitration clause virtually identical to that contained in Howsam's 1992 Agreement clearly and unmistakably evidenced the parties' intent to submit § 10304 eligibility issues to the arbitrators.

The 1992 Agreement contained a provision that it was to be "construed and enforced in accordance with the laws

of the State of New York." Nevertheless, the Tenth Circuit rejected Howsam's contention that it should follow New York's construction of the arbitration clause, holding that the Federal Arbitration Act, 9 U.S.C. § 2, and related case law, created "a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." App. 20 (citation omitted).

The Tenth Circuit recognized "that the circuit courts of appeals are almost evenly divided on the issue of whether the limitations period set forth in § 10304 is a substantive eligibility requirement, or jurisdictional prerequisite to arbitration, which must be determined in the first instance by the courts." App. 28.

SUMMARY OF THE ARGUMENT

Resolution of disputes through arbitration is a matter of agreement. Parties are not required to arbitrate unless they have agreed to do so. Like most other brokerage firm customers, Howsam signed a pre-printed, standard form agreement which contained an arbitration clause. That clause required arbitration of all disputes with DWR arising out of her DWR accounts, past, present, or future, before the NASD or any exchange of which DWR was a member.

Howsam elected to arbitrate before the NASD, which, like the exchanges, has a rule, § 10304, entitled "Time Limitation Upon Submission," which states that claims are not "eligible for submission to arbitration . . . where six (6) years have elapsed from the occurrence or event giving rise to the act or dispute, claim or controversy." J.A. 48.

DWR brought an action to enjoin the arbitration, on the ground that Howsam's claims were ineligible under the NASD's timeliness rule, which the trial court properly dismissed. The Tenth Circuit erred when it reversed the trial court's judgment on the ground that "the district court erred in finding that the parties 'clearly and unmistakably' agreed to allow an arbitrator, rather than the courts, to decide whether specific disputes are arbitrable." App. 2.

Howsam and DWR agreed to arbitrate "all controversies" between them arising from Howsam's accounts, transactions, or "the construction, performance or breach of this or any other agreement between us. . . ." J.A. 7. There is no dispute that Howsam's claims arose out of her DWR accounts and transactions, and thus fall within the scope of the arbitration agreement. Notwithstanding the use of the words "eligible for submission to arbitration under this Code" in the time limitation rule, the timeliness issue is not one of arbitrability. It is instead a defense similar to statutes of limitation or repose.

Even if the time limitation contained in the NASD rule is an arbitrability issue, the Court should allow the arbitrators to decide it because the parties have clearly and unmistakably agreed to submit it to arbitration. The evidence of their clear and unmistakable intent to do so is contained in the arbitration agreement itself and/or by incorporation of the Code, which includes § 10324. Section 10324 provides that "arbitrators shall be empowered to interpret and determine the applicability of all provisions under" the Code, which interpretation "shall be final and binding upon the parties." J.A. 48.

Arbitration is intended to provide faster and less expensive resolution of disputes than the court system affords. Having imposed arbitration upon its customers through the use of standard arbitration clauses in customer agreements, DWR, particularly as the drafter of the agreement, must be held to its agreement to submit all disputes to arbitration. Otherwise, as in Howsam's case, DWR and other firms can and will discourage claims against them by prolonging the dispute resolution process with litigation and causing customers to incur undue and unanticipated expense.

ARGUMENT

I. ARBITRATION AND SECURITIES INVESTORS

A. The Federal Arbitration Act

Private arbitration has existed as a means of resolving disputes since ancient Greece, Rome, and Israel. C. Edward Fletcher, *Arbitrating Securities Disputes*, 12 (PLI, 1990). Initially, in the United States, however, there was a widespread judicial mistrust of arbitration. Many courts refused to enforce mandatory arbitration clauses because they believed that arbitration took jurisdiction away from the courts. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 n.4 (1974). In response to the judicial hostility towards arbitration, in 1925, Congress passed the Federal Arbitration Act ("FAA").

In passing the FAA, Congress sought to "place arbitration agreements on equal ground with other, more accepted contractual arrangements" and to overcome judicial disapproval of arbitration. H.R. Rep. No. 96, 68th Cong.,

1st Sess., 1 (1924). According to the House Report accompanying the FAA:

> The need for the law arises from an anachronism of our American law. Some centuries ago, because of the jealousy of the English courts for their own jurisdiction, they refused to enforce specific agreements to arbitrate upon the ground that the courts were thereby ousted from their jurisdiction. This jealousy survived for so long a period that the principle became firmly embedded in the English common law and was adopted with it by the American courts. The courts have felt that the precedent was too strongly fixed to be overturned without legislative enactment, although they have frequently criticised the rule and recognized its illogical nature and the injustice which results from it. This bill declares simply that such agreements for arbitration shall be enforced, and provides a procedure in the Federal courts for their enforcement.

Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 221 n.6 (1985).

Section 2 of the FAA, which is the primary substantive provision of the FAA, *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983), provides:

> A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such

> grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2 (1994).

This language mandates that arbitration agreements be enforced "as a matter of contract law" by both federal and state courts. Accordingly, the FAA transformed arbitration into a judicially approved method of dispute resolution. Dennis O'Leary, *PaineWebber v. Elahi: The First Circuit Provides a Return for Investors and Allows Them Their Day in Arbitration*, 32 New Eng. L. Rev. 553, 560 (Winter 1998).

In the seminal case of *Moses H. Cone Mem'l Hosp.*, the Court confirmed that the FAA demonstrates a *strong* federal policy in favor of arbitration, applicable both in state and federal courts. 460 U.S. at 24. The opinion additionally instructs that any doubts concerning the arbitrability of an issue should be resolved in favor of arbitration. In frequently cited language, the Court stated:

> Federal law in the terms of the Arbitration Act governs [the issue of whether the dispute was arbitrable] in either state or federal court .... Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. The effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act .... The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language

> itself or an allegation of waiver, delay, or a like defense to arbitrability.

Id. at 24-25.

B. Supreme Court Precedent in Securities-Related Arbitration

When an individual investor opens an account with a securities broker, he or she invariably must sign a standard-form contract as a precondition of conducting business with the broker. This non-negotiable contract, often referred to as a "Customer Agreement," generally contains an arbitration clause under which the parties agree to submit any future disputes to arbitration conducted by one of the securities industry's self-regulatory organizations ("SRO"). Proceedings initiated under the broad and inclusive arbitration clause are subject to arbitration guidelines established by the SROs, a group which includes all the major stock exchanges and the NASD. Guy Nelson, *The Unclear "Clear and Unmistakable" Standard: Why Arbitrators, Not Courts, Should Determine Whether a Securities Investor's Claim is Arbitrable*, 54 Vand. L. Rev. 591, 592 (March 2001). A history of the development of securities industry arbitration from the mid-1880's is contained in Norman S. Poser's *Making Securities Arbitration Work*, 50 SMU L. Rev. 277, 280-287 (September/October 1996).

Mandatory brokerage firm arbitration agreements were not always favored. In 1953, the Court decided *Wilko v. Swan*, 346 U.S. 427 (1953), the first reported Supreme Court case addressing arbitration of claims alleging violations of the federal securities laws. Concerned that mandatory arbitration denied investors the protection afforded them under the securities acts, the Court

pronounced that pre-dispute arbitration agreements relating to matters arising under the Securities Act of 1933 ("1933 Act") were not enforceable in light of § 14 of the 1933 Act, the non-waiver provision. The Court held that an investor could not waive the right to bring an action under the 1933 Act. Most federal courts believed that the same reasoning applied to claims under the Securities Exchange Act of 1934 ("1934 Act"). *See, e.g., Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Moore,* 590 F.2d 823 (10th Cir. 1978). The courts' refusal to enforce pre-dispute arbitration agreements in cases brought by investors against brokerage firms continued for the next 30 years.

In 1985, in *Byrd*, the Court took a large step toward abolishing the *Wilko* doctrine. In *Byrd*, the customer-plaintiff alleged claims under state law and the 1934 Act. The issue was whether a federal court could try both arbitrable and nonarbitrable claims together if they were sufficiently factually and legally "intertwined" or whether the claims must be bifurcated. The Court held that bifurcation was mandated by the FAA, "even where the result would be the possibly inefficient maintenance of separate proceedings in different forums." *Id.* at 217. In so holding, the Court reasoned that the primary goal of the FAA was to enforce private agreements to arbitrate and that this goal takes precedence over the secondary goal of encouraging efficient and speedy dispute resolution. In a concurring opinion, Justice White observed that although the question of whether the *Wilko* doctrine applied to 1934 Act claims was not before the Court, there was "substantial doubt" on this question.

In the same term *Byrd* was decided, the Court held, in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473

U.S. 614 (1985), that an agreement to arbitrate disputes arising under the Sherman Act was enforceable, stressing that commercial arbitration agreements must be enforced according to their terms.

Two years later, in *Shearson/American Express v. McMahon*, 482 U.S. 220 (1987), in a 5-4 decision, the Court held that claims under the 1934 Act were arbitrable. In so deciding, the majority opinion reasoned that the *Wilko* court had been concerned that the arbitration procedures which existed in 1953 were inadequate to ensure protection of investors' substantive rights under the securities laws. Since *Wilko*, however, Congress had given the Securities and Exchange Commission ("SEC") additional powers to review the arbitration procedures employed by the SROs and to ensure their adequacy. The Court concluded that the concerns expressed in *Wilko* were no longer present and that the parties' agreement to arbitrate 1934 Act claims was enforceable.

Although the *McMahon* dissent stated that the majority's decision effectively overruled *Wilko*, it was not officially overruled until two years later when the Court decided *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989). Finding that no relevant distinction existed between the 1933 and 1934 Acts, *Rodriguez* established that pre-dispute arbitration agreements with respect to claims under the 1933 Act also were valid, thereby removing the *Wilko* exception to arbitrability of customer claims.

II. THE TIME LIMITATION "ELIGIBILITY" RULE

In SRO arbitrations, state and federal statutes of limitation are supplemented by time limitation rules. Regardless of the SRO forum elected by the parties, the procedures that govern the arbitration are, for the most part, the same. All SROs which sponsor arbitration programs have adopted, with the approval of the SEC, the Uniform Code of Arbitration ("UCA") developed by the Securities Industry Conference on Arbitration ("SICA"), a task force created by the securities industry for the purpose of responding to SEC concerns over the lack of uniformity in the rules governing arbitration among the various SROs. Margaret M. Harding, *The Cause and Effect of the Eligibility Rule in Securities Arbitration: The Further Aggravation of Unequal Bargaining Power,* 46 DePaul L. Rev. 109, 120 (Fall 1996).

The arbitration clause at issue here provides that controversies "shall be determined by arbitration before any self-regulatory organization or exchange of which Dean Witter is a member." J.A. 7. Howsam chose to bring her arbitration proceeding before the NASD.

The NASD's time limitation rule, § 10304 of the Code, provides as follows:

> **Time Limitation on Submission.** No dispute, claim, or controversy shall be eligible for submission to arbitration under this Code where six (6) years have elapsed from the occurrence or event giving rise to the act or dispute, claim or controversy. This Rule shall not extend applicable statutes of limitations, nor shall it apply to any case

> which is directed to arbitration by a court of competent jurisdiction.[3]

J.A. 48. The rule was adopted almost verbatim from the UCA's time limitation rule, as amended in 1984. According to Professor Constantine Katsoris, an original public member of SICA, the rule was included in the UCA as a matter of convenience to prevent stale claims from going to arbitration. Six years was chosen as the time period because it "dovetailed" the SEC's books and record-keeping retention requirement. Harding, 46 DePaul L. Rev. at 141.

The time limitation rule may prevent a claim from proceeding in arbitration even where a statute of limitation may not yet have run on the claim. Although few claims have statutes of limitation as long or greater than six years, such statutes generally do not begin to run until the cause of action "accrues" when both the injury and its cause are known or should have been known by the exercise of reasonable diligence. *See, e.g.,* § 13-80-108, Colorado Revised Statutes.[4] In addition, equitable tolling may extend the time a customer has to assert a claim in court. Thus, although ostensibly the Court's endorsement of SRO arbitration as an alternative for the resolution of disputes between investors and broker-dealers was based in part on the presumption that customers do not give up

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[3] Rule 603 of the New York Stock Exchange Arbitration Rules and Rule 605 of the American Stock Exchange Rules are substantially the same and are titled "Time Limit Upon Submission" and "Submission Limitations," respectively.

[4] "**When a cause of action accrues.** (1) . . . a cause of action for injury to person, property, reputation, possession, relationship, or status shall be considered to accrue on the date both the injury and its cause are known or should have been known by the exercise of reasonable diligence."

substantive rights when agreeing in advance to arbitrate a dispute, the time limitation rule, as interpreted and applied by the courts and the SROs, may result in the loss of the most basic of substantive rights: the right to seek redress for wrongful conduct, a right the investor would have had but for the SRO time limitation rule. *Mitsubishi*, 473 U.S. at 627-628.

The SROs' time limitation rules, also referred to as "eligibility" rules, have generated a great deal of litigation, much of it relating to the question before the Court today: whether the arbitration panel or the district court should decide the rules' applicability. In general, brokerage firms argue that the question is for the courts to decide, while customers usually take the opposite position. Often, as in this case, after customers have filed arbitration claims, brokers have gone to court for injunctive relief and a determination of whether the claims fall within the six year period. Thus, although securities arbitration is touted as a speedy and inexpensive alternative to litigation, brokers can impose expensive and lengthy litigation before the customer ever reaches arbitration.

III. THE "CLEAR AND UNMISTAKABLE" REQUIREMENT

A. *AT&T Technologies, Inc. v. Communications Workers of America*

In 1986, in *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643 (1986), the Court set forth the current standard used to determine the issue of *who*, the courts or the arbitrators, will determine whether a dispute is arbitrable under the terms of a predispute arbitration agreement.

The debate in *AT&T Technologies* concerned arbitration of disputes arising out of a collective-bargaining agreement, entered into between AT&T and its Union. Article 8 of the agreement contained a standard arbitration clause which provided that "differences arising with respect to the interpretation of this contract or the performance of any obligation hereunder" must be arbitrated. *Id.* at 645. Article 9, however, excluded from arbitration AT&T's decisions involving management judgments, including, without limitation, the hiring and termination of employees. Article 20 imposed the order in which workers were to be laid off due to lack of work. A dispute arose when AT&T laid off 79 workers from its Chicago-based location.

Relying on Article 9, AT&T refused to submit the workers' grievance to arbitration, insisting that "the Company's decision to lay off workers when it determines that a lack of work exists in a facility is not arbitrable." *Id.* at 646. The Union, on the other hand, argued that, pursuant to Article 20, a lay off required a work shortage. In its suit to compel arbitration, the Union argued that it was for the arbitrator, not the courts, to decide whether the lay offs were justified by lack of work. *Id.*

The district court found that "the union's interpretation of Article 20 was at least 'arguable'" and held that it was "for the arbitrator, not the court, to decide whether the union's interpretation has merit." *Id.* at 647. Accordingly, the district court ordered AT&T to arbitrate. The Seventh Circuit affirmed, acknowledging the general rule that courts, not arbitrators, are to decide issues of arbitrability, but carving out an exception to the general rule where (1) the agreement contains a standard arbitration clause; (2) the parties have not clearly excluded the

arbitrability issue from arbitration; and (3) deciding the issue would entangle the court in interpretation of substantive provisions of the agreement and thereby involve consideration of the merits of the dispute. *Id.* at 648. Because all of those factors were present, the Seventh Circuit declined the invitation to decide arbitrability and ordered AT&T to arbitrate the issue.

This Court granted certiorari, rejected the Seventh Circuit's exception to the general rule, and reversed. In doing so, the Court relied on a series of cases, decided some 25 years prior, known as the Steelworkers Trilogy: *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); and *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). The Trilogy established the following four principles:

First, "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Warrior & Gulf*, 363 U.S. at 582; *American Mfg. Co.*, 363 U.S. at 570-571. This premise recognizes the fact that arbitrators have authority to resolve disputes only because the parties agreed in advance to submit them to arbitration. Second, "the question of arbitrability . . . is undeniably an issue for judicial determination. Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator." *AT&T Technologies*, 475 U.S. at 649, *citing Warrior & Gulf*, 363 U.S. at 582-583. Third, a court has "no business weighing the merits of the" underlying claim when it reviews the arbitrability issue. *American Mfg. Co.*, 363 U.S. at 568. Finally, where the

contract contains an arbitration clause, there is a presumption of arbitrability in the sense that "[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage."[5] *Warrior & Gulf*, 363 U.S. at 582-583.

With these principles in mind, this Court determined that it is for the court, not the arbitrators, to decide in the first instance whether the parties intended the dispute to be resolved through arbitration, and that intent must be demonstrated by "clear and unmistakable" evidence. Once it is determined that the parties *intended* to submit the *subject matter* of the dispute to arbitration, the arbitrator, and not the court, then determines all procedural questions which grow out of the dispute and bear on its final disposition. *AT&T Technologies*, 475 U.S. at 651. The case was remanded for determination of whether AT&T was required to arbitrate.

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[5] Such a presumption is particularly applicable where the clause is as broad as the one utilized in *AT&T Technologies*, which provides for arbitration of " 'any differences arising with respect to the interpretation of this contract or the performance of any obligation hereunder . . . .' In such cases, '[in] the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail.' " *AT&T Technologies*, 475 U.S. at 650, *citing Warrior & Gulf*, 363 U.S. at 584-585.

B. *First Options of Chicago, Inc. v. Kaplan*

In *First Options v. Kaplan*, 514 U.S. 938 (1995), the Court confirmed the standard for determining arbitrability in the context of a pre-dispute securities arbitration agreement. Kaplan's wholly-owned investment company had signed an agreement containing an arbitration clause, but the Kaplans had not individually signed such an agreement. First Options sought arbitration of claims against the investment company and the Kaplans for money they owed First Options.

The Kaplans denied they were obligated to arbitrate. The arbitrators decided they had power to rule on the dispute and entered an award against the Kaplans. The Kaplans then requested that the district court vacate the award, and First Options requested its confirmation. The district court confirmed the award. On appeal, the Third Circuit agreed with the Kaplans that their dispute was not arbitrable. *Id.* at 941.

This Court granted certiorari and affirmed the Third Circuit's ruling. In doing so, the Court applied the "clear and unmistakable" standard laid out in *AT&T Technologies*, explaining that "arbitration is simply a matter of contract between the parties," a way to resolve disputes, but only those disputes the parties have agreed to arbitrate. *First Options*, 514 U.S. at 943. In determining whether parties have agreed to submit the arbitrability question to arbitration, courts should apply ordinary state law principles that govern the formation of contracts. *Id.* at 944.

First Options clarifies that courts should presume in favor of arbitration only where the scope and breadth of

the arbitration agreement, and not the agreement itself, are at issue, unless the agreement at issue "clearly and unmistakably" provides otherwise.

Neither *AT&T Technologies* nor *First Options* discussed in detail what constitutes "clear and unmistakable" evidence of the parties' intent to have the arbitrator decide issues of arbitrability. Parties faced with the issue, as well as the lower courts charged with applying the "clear and unmistakable" standard, have disagreed on whether clauses such as those contained in Howsam's agreement meet the standard. Moreover, courts have disagreed on the question of whether or not the SROs' six year time limitation is an arbitrability issue.

IV. THE CONFLICT AMONG THE CIRCUITS AND STATE COURTS

The issue of whether courts or arbitrators should decide eligibility for arbitration under § 10304 of the Code has been the subject of numerous conflicting rulings from various state and federal courts. Five federal circuits have determined that courts, not arbitrators, should decide the issue of § 10304 eligibility. *See, e.g., Painewebber, Inc. v. Hofmann*, 984 F.2d 1372 (3d Cir. 1993); *Dean Witter Reynolds, Inc. v. McCoy*, 995 F.2d 649 (6th Cir. 1993); *Smith Barney, Inc. v. Sarver*, 108 F.3d 92 (6th Cir. 1997); *Edward D. Jones & Co. v. Sorrells*, 957 F.2d 509 (7th Cir. 1992); *Cogswell v. Merrill Lynch, Pierce, Fenner & Smith*, 78 F.3d 474 (10th Cir. 1996); *Merrill Lynch, Pierce, Fenner & Smith v. Cohen*, 62 F.3d 381 (11th Cir. 1995).

Five federal circuits have held to the contrary, holding that the decision is reserved for arbitrators. *See, e.g., Painewebber Inc. v. Elahi*, 87 F.3d 589 (1st Cir. 1996);

PaineWebber Inc. v. Bybyk, 81 F.3d 1193 (2d Cir. 1996); *Smith Barney Shearson, Inc. v. Boone*, 47 F.3d 750 (5th Cir. 1995); *FSC Sec. Corp. v. Freel*, 14 F.3d 1310 (8th Cir. 1994); *O'Neel v. National Ass'n of Sec. Dealers, Inc.*, 667 F.2d 804 (9th Cir. 1982).

State courts have similarly split on the question of whether courts or arbitrators should decide the question of § 10304 eligibility. *See, e.g., Cigna Fin. Advisors v. Rosen*, No. CV 94 0705235 (Conn. Super. Ct. Jan. 9, 1995), 1995 Conn. Super. LEXIS 74 (holding that courts decide eligibility question); *Citibank v. Crowell, Weedon & Co.*, 4 Cal. App. 4th 844 (Cal. App. 1992) (construing identical language in Municipal Securities Rulemaking Board Arb. Code, rule G-35, Sec. 6, holding courts decide); *Smith Barney, Inc. v. Keeney*, 570 N.W.2d 75 (Iowa 1997) (holding arbitrators decide); *Shahan v. Staley*, 188 Ariz. 74, 932 P.2d 1345 (Ariz. App. 1996) (to same effect).

To complicate matters further, the courts deciding these cases have reached their decisions using conflicting lines of reasoning. *Cf. Boone*, 47 F.3d at 753-54 (holding that § 10304 eligibility is arbitrability question, but is one of procedural rather than substantive arbitrability, thus determinable by the arbitrators), and *Elahi*, 87 F.3d at 599 (holding that § 10304 eligibility is presumptively not an arbitrability issue, unless parties clearly and unmistakably express an intent to make it so). *Cf. also Freel*, 14 F.3d 1310 (basing its holding on the fact that § 10324 unambiguously grants arbitrators power to decide all issues under the Code), and *Bybyk*, 81 F.3d 1193 (basing its holding on contract interpretation principles which call for courts to construe an ambiguous provision against the drafter).

V. COURTS SHOULD DECIDE ONLY THE THRESHOLD QUESTION OF SUBJECT MATTER ARBITRABILITY

Over 30 years ago, the Court provided a carefully reasoned analysis of the question of which issues should be decided by courts and which by arbitrators. In *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964), an issue arose as to whether the court or the arbitrator should determine whether a union abandoned its grievance by failing to comply with a contract requirement that notice of a grievance be filed with the Union Shop Steward within four weeks after the event's occurrence or latest existence. Justice Harlan, writing for a unanimous Court, held that the dispute, including the question of whether the prerequisite to arbitration had been met, should be submitted to the arbitrator. In so deciding, the Court addressed the problem of attempting to distinguish between "substantive arbitrability" issues and "procedural arbitrability" issues:

> We think that labor disputes of the kind involved here cannot be broken down so easily into their 'substantive' and 'procedural' aspects. Questions concerning the procedural prerequisites to arbitration do not arise in a vacuum; they develop in the context of an actual dispute about the rights of the parties to the contract or those covered by it.

Id. at 556-557. The opinion goes on to explain that "[i]t would be a curious rule which required that intertwined issues of 'substance' and 'procedure' growing out of a single dispute and raising the same questions on the same facts had to be carved up between two different forums, one deciding after the other." *Id.* at 557. Thus, if "the parties

are obligated to submit the *subject matter* of a dispute to arbitration, 'procedural' questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator." *Id.* (emphasis added). Any other conclusion would produce duplication of effort and an opportunity for deliberate delay.

Here, as a typical brokerage firm customer signing a typical pre-printed form agreement, Howsam agreed to arbitrate all claims and disputes arising out of her account, the "subject matter." Because Howsam's claims undeniably arise out of securities transactions in her accounts, they are arbitrable. The timeliness issue raised under § 10304 is merely a procedural prerequisite to arbitration, and is thus for the arbitrators to decide in accordance with the Court's holding in *John Wiley*. Once it is established that the arbitrators have jurisdiction of the subject matter, leaving issues such as timeliness to the arbitrators raises no cause for concern that arbitration is being imposed on a non-consenting party.

The difficulty of allowing "minitrials" to determine which claims, or portions of claims, fall within or without the six year period is amply demonstrated in the Third Circuit's *Hofmann* opinion, which spends pages instructing the trial court. The court states that the trial court will have to hold a hearing and may have to receive extrinsic evidence in deciding which claims are arbitrable. The court acknowledges that "the district court will be forced to walk a fine line" in balancing the rule that parties should not be forced to arbitrate matters they have not agreed to arbitrate against the rule that courts must not decide potential merits of the underlying claims. It acknowledges that "[a]t times, it will be impossible to give

full effect to both of these goals . . . ." *Hofmann*, 984 F.2d at 1381.

John Wiley anticipated just this type of quandary and instructed that courts should avoid carving up such intertwined issues between two different forums.

VI. SECTION 10304 IS A PROCEDURAL RATHER THAN SUBSTANTIVE RULE, AND IS THUS FOR THE ARBITRATORS TO APPLY

In *Boone*, Boone filed an arbitration claim against Smith Barney Shearson ("SBS") with the American Stock Exchange ("AMEX"). In response, SBS filed an action in district court seeking injunctive and declaratory relief preventing Boone from arbitrating his claims, arguing the claims were ineligible for arbitration under AMEX Rule 605 (AMEX's version of § 10304). The district court denied SBS the relief it sought, stating that "under established Fifth Circuit Court precedent, the timeliness question should be decided by the arbitrator and not by a federal court." *Boone*, 47 F.3d at 751. The same district court held against SBS on a similar complaint involving § 10304, and the cases were consolidated for appeal. *Id.* at 752.

Relying on *John Wiley*, the Fifth Circuit stated that "[f]rom the broad language of the Customer Agreements it is clear that [the parties] intended to have 'any controversy' arising between them resolved through arbitration" and held that the timeliness issues were "issues of procedural arbitrability and must be decided by the arbitrator." *Boone*, 47 F.3d at 754. *See also Freel*, 14 F.3d at 1312, in which the court questions, but does not decide, whether the eligibility rule is one of "procedural arbitrability." The court, in footnote 2, cites *Miller v. Prudential Bache*

Securities, Inc., 884 F.2d 128 (4th Cir. 1989), and *Gaines v. Financial Planning Consultants, Inc.*, 857 S.W.2d 430 (Mo. App. 1993), in support of its holding that § 10304 issues are procedural and therefore to be determined by the arbitrators.

The "broad language" in the *Boone* customer agreements provided:

> any controversy arising out of or relating to my accounts, to transactions with you for me or to this agreement or the breach thereof, shall be settled by arbitration in accordance with the rules then in effect, of the National Association of Security Dealers, Inc. and/or the American Stock Exchange, Inc. as I may elect.

47 F.3d at 751 n.1.

Howsam's 1992 Agreement is even more broad than those considered in *Boone*. The 1992 Agreement includes in the matters to be arbitrated "the construction . . . of this or any other agreement between us, whether such controversy arose prior to, on or subsequent to the date hereof . . . ." J.A. 7.

In *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995), the Court stated:

> The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of *waiver, delay, or a like defense* to arbitrability.

Id. at 62 n.8 (emphasis added), quoting *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24-25. Section 10304 is akin to

"waiver, delay or like defense" and should be viewed as procedural rather than substantive.

VII. THE § 10304 TIME LIMITATION ISSUE IS NOT AN ISSUE OF ARBITRABILITY, AND THUS, PRESUMPTIVELY MUST BE DECIDED BY THE ARBITRATOR

One author has written that the threshold arbitrability issues which should be determined by courts are whether there was an agreement to arbitrate, whether the agreement to arbitrate covered the subject matter of the dispute, and whether the party opposing arbitrability executed the arbitration agreement.

> Extending the scope of arbitrability questions beyond these threshold issues circumscribes the discretion allowed to the arbitrators and thereby reduces or destroys the usefulness of arbitration. For example, if the rules of an arbitral forum require that a statement of claim specify the relevant facts and the remedies sought, it would be both absurd and destructive to say that the question whether a statement of claim complies with this requirement is a question of arbitrability and therefore for the court to decide. Yet to hold . . . that the [NASD's] eligibility rule raises a question of arbitrability is not much less absurd or much less destructive.

Poser, 50 SMU L. Rev. at 329.

In *Elahi*, a case involving an arbitration clause similar to that in the 1992 Agreement, the First Circuit presumed that where the parties had entered into a valid arbitration agreement which "covers the subject matter of the underlying dispute," "the parties have made a

commitment to have an arbitrator decide all the remaining issues necessary to reach a decision on the merits of the dispute." 87 F.3d at 599. As the court wrote, the entry by the parties into a valid agreement satisfied the *First Options* arbitrability threshold, and the agreement's coverage of the subject matter of the dispute satisfied the *AT&T* arbitrability requirement. Based upon the breadth of the arbitration clause and the unlikelihood that the parties intended such issues as timeliness of submission to affect the arbitrability of the dispute, the court presumed "that the parties here did not intend to make the section [10304] time bar a threshold 'arbitrability' question to be determined by the courts rather than an arbitrator." *Elahi*, 87 F.3d at 600.

The court then looked to the agreement between the parties "for any clear and unmistakable expression of an intent contrary to that presumption" and found none. *Id.* It pointed out, in footnote 11, that it was unlikely that an investor would have any intent whatsoever with regard to § 10304 or have detailed knowledge of the NASD arbitration rules. It further found that the phrase "submission to arbitration" found in § 10304 "could mean submission for full adjudication of the merits, rather than submission for preliminary determinations, such as whether the claim is time-barred, or whether the appropriate fee was paid, or whether the claim was submitted on the proper forms." *Id.*

The court noted that the NASD had itself stated that "Section [10304] does not specify who has the authority to determine if a claim is eligible for submission to arbitration. 59 Fed. Reg. 39,373, 39,373-74, quoted in *Cogswell*, 78 F.3rd at 479-80." It therefore concluded that the "eligible for submission" language in § 10304 "is not a clear expression of intent to make timeliness an arbitrability

issue." *Id.* at 601. The court further found that § 10324, empowering the arbitrator to "interpret and determine the applicability of all provisions under this Code," *id.* at 598, also countered the argument that the parties intended § 10304 issues to be determined only by the courts. It stated that because § 10304 is part of the Code, one would assume that it was intended that the NASD itself apply it. It also noted that the Code cannot be part of the parties' agreement until the NASD is chosen as an arbitration forum.

In footnote 12, the *Elahi* court noted that *John Wiley* and its progeny would justify its decision but that "simply labelling timeliness issues as 'procedural,' and thus for the arbitrator, does not give due regard to the parties' contractual intent," since the parties could contractually make timeliness an arbitrability issue. *Id.* at 601.

The presumption announced by the Court in *John Wiley*, and followed in *Elahi* and *Boone*, is that issues other than (1) the existence of an arbitration agreement between the parties and (2) whether the subject matter of the underlying dispute is within the scope of the arbitration clause are not "arbitrability" issues. *Elahi*, 87 F.3d at 599. This presumption must not be confused with and in no way diminishes the presumption established in *AT&T Technologies* and *First Options*, that issues of arbitrability are normally to be decided by courts, not arbitrators. *Id.*

VIII. THERE IS CLEAR AND UNMISTAKABLE EVIDENCE OF THE PARTIES' INTENT THAT THE ARBITRATORS DECIDE § 10304 ISSUES

If the Court decides that § 10304 does present an arbitrability issue for a court to determine in the first

instance, it should also decide that the parties' pre-dispute arbitration agreement demonstrates clear and unmistakable evidence of their intent to submit § 10304 issues to the arbitrator.

The Court has consistently held that arbitrability questions are matters of contract interpretation. The basic premise is that a party cannot be forced to arbitrate any issue it has not agreed to submit to arbitration. *AT&T Technologies,* 475 U.S. at 648. As a rule, arbitrability issues should first be determined by the courts. However, the parties may provide that such issues be determined by the arbitrators if they do so clearly and unmistakably. *First Options*, 514 U.S. at 938.

If the *First Options* analysis is applied to the 1992 Agreement's arbitration clause, it must be concluded that the arbitrators are to determine timeliness under § 10304. The agreement provides that "all controversies" between the parties concerning or arising from Howsam's account or any transactions involving Howsam and DWR or "the construction, performance or breach" of any agreement between the parties "shall be determined by arbitration . . . ." J.A. 7. The 1992 Agreement further provides that "[t]he parties are waiving their right to seek remedies in court, including the right to jury trial." J.A. 6.

Where, as here, there is no dispute that the arbitration agreement exists and was in fact executed by the parties, and where Howsam's claims arise out of her accounts and transactions with DWR, the clear and unmistakable intent of the parties is to submit all controversies, including timeliness of the claims, to the arbitrators.

The Second Circuit, in *Bybyk*, applied the clear and unmistakable evidence standard to an agreement virtually identical to the 1992 Agreement. Referring to the provision that any and all controversies are to be determined by arbitration, the court stated:

> The wording is inclusive, categorical, unconditional and unlimited. The words 'any and all' are elastic enough to encompass disputes over whether a claim is timely and whether a claim is within the scope of arbitration. That provision expressly includes the category of disputes regarding the construction of the Agreement – such as whether it incorporates the NASD Code . . . .
>
> The parties' broad grant of power to the arbitrators is unqualified by any language carving out substantive eligibility issues (with or without specific reference to timeliness) for resolution by the courts. PaineWebber is thus unable to overcome the presumption established in the first of the above-listed provisions that 'any and all controversies' are to be arbitrated. An objective reading of the Agreement, therefore, leads us to conclude that the parties intended to arbitrate issues of arbitrability. Put another way, no draftsman seeking a six-year limitation on the scope of arbitrability would craft this language to accomplish that objective. If the Bybyks' claim is untimely, PaineWebber's remedy is to defend the arbitration action on timeliness grounds, not to enjoin arbitration all together.

81 F.3d at 1199-1200.

Those courts, including the Tenth Circuit, in *Cogswell* and this matter below, and the Eleventh Circuit, in *Cohen*, which purported to apply *First Options* to similar

agreements and found that courts should determine eligibility under § 10304, did not give proper deference to the plain meaning of the parties' arbitration agreements. If the customers read and understood the arbitration clauses in their customer agreements, they were led to believe that any and all controversies arising out of their accounts and transactions with the broker/dealers would be arbitrated. There is little chance that they were aware of § 10304 at the time they signed their agreements. It therefore makes little sense to rely on that rule in attempting to ascertain the customer's intent, particularly when the effect of the rule is potentially to deny the investor the opportunity to arbitrate his claims, even though statutes of limitation have not run on such claims.

A. *Mastrobuono's* Instructions on Contract Interpretation

Mastrobuono, announced by the Court in the same term as *First Options*, provides guidance for analysis of pre-dispute arbitration agreements. The issue in that case was "what the contract has to say about the arbitrability of petitioners' claim for punitive damages." 514 U.S. at 58. The Court applied three established common law principles of contract interpretation: first, pre-dispute arbitration agreements and the Code should be construed as a single writing and interpreted as a whole; second, all of the documents comprising a single agreement should be considered consistent with each other; and third, ambiguous language should be construed against the drafting party. As will be shown following, application of those three principles to the 1992 Agreement further shows that the parties "clearly and unmistakably" intended that the arbitrators decide timeliness issues under § 10304.

1. The 1992 Agreement, § 10304, and § 10324 Should Be Interpreted As Part Of An Overall Agreement

The first principle asserted in *Mastrobuono* is that provisions of the parties' agreement and the arbitration code should be read together as a whole. This approach comports with § 202(2) of the *Restatement, Second, Contracts*, which states that "[a] writing is interpreted as a whole, and all writings that are part of the same transaction are interpreted together."

There is no provision in the 1992 Agreement or other typical customer agreements limiting the time within which arbitration may be pursued. Section 10304 is the provision relied upon by DWR in seeking to prevent arbitration. Section 10324, which is contained in the same Part 10300 (formerly Part III) of the Code as § 10304, provides:

> The arbitrators shall be empowered to interpret and determine the applicability of all provisions under this Code .... Such interpretations ... shall be final and binding upon the parties.

J.A. 48. The arbitrators are thus designated to interpret and apply § 10304 and, in doing so, to determine what claims are eligible thereunder for submission to arbitration.

The Eighth Circuit, in *Freel*, held that when the parties agreed to submit their dispute to the NASD, "they adopted the entire NASD Code, including Section [10324]. Unlike the Seventh Circuit, we hold that the parties' adoption of this provision is a 'clear and unmistakable' expression of their intent to leave the question of arbitrability to the arbitrators." 14 F.3d at 1312-1313. The court

read the Code as a whole and saw no reason that § 10324 should not authorize arbitrators to apply § 10304. *Freel* has been followed in a number of state courts, including *Mid-State Sec. Corp. v. Edwards*, 309 N.J. Super. 73, 706 A.2d 773 (1998); *Keeney*; *Shahan*; *Nettleton v. Edward D. Jones & Co.*, 904 S.W.2d 409 (Mo. App. 1995); and *Gaines*.

The Eighth Circuit's reliance on § 10324 makes good sense. Section 10304 does not specify who will determine timeliness. Section 10324 does so by expressly granting arbitrators the power to interpret and determine all Code provisions. Accordingly, Howsam, who elected the NASD and its rules, and DWR, which was contractually bound by Howsam's selection, agreed that the arbitrators would determine all issues, including timeliness under § 10304.

2. Contract Provisions Should Be Construed as Consistent with Each Other

The second contract principle to which the Court referred in *Mastrobuono* is "that a document should be read to give effect to all its provisions and to render them consistent with each other." 514 U.S. at 63. This principle is found in §§ 202(5) and 203(a) of the *Restatement, Second, Contracts*. Section 202(5) states that "[w]herever reasonable, the manifestations of intention of the parties to a promise or agreement are interpreted as consistent with each other . . . ."

Application of this standard discredits the principal argument employed by the *Sarver*, *Cohen*, and *Cogswell* courts. For instance, in finding that neither the provisions of the Code nor the customer agreements at issue met the

"clear and unmistakable" standard, *Cogswell* relied heavily on the premise that *specific* provisions, such as § 10304, prevailed over *general* provisions, such as § 10324. However, *Cogswell* does not contend that §§ 10304 and 10324 conflict. Section 10304 lays out a time limitation for claims, but does not indicate whether a court or arbitrators should interpret and apply it. Section 10324 does not specifically mention § 10304, but declares that the applicability of all provisions of the Code will be interpreted and determined by the arbitrators. There is no conflict; the two sections address different issues and § 10324 supplements § 10304. *Smith Barney, Inc. v. Painters Local Union No. 109 Pension Fund*, 579 N.W.2d 518, 526 (Neb. 1998).

Cogswell's and the other court's strained application of the general rule regarding specific versus general contract provisions violates the cardinal principle of contract construction laid out in the *Restatement* and approved by this Court in *Mastrobuono*. The interpretation which gives a reasonable, lawful, and effective meaning to all terms is preferred to an interpretation which leaves a portion of the agreement with no effect. *Keeney*, 570 N.W.2d at 78. Interpreting the Code as internally consistent and consistent with the 1992 Agreement creates an irrefutable presumption that the parties "clearly and unmistakably" agreed to leave *all* decisions regarding the applicability of § 10304 to the arbitrators.

3. Ambiguous Language Is Construed Against the Drafting Party

The 1992 Agreement and the Code provide "clear and unmistakable" evidence that the parties intended the arbitrators to decide the eligibility issue. Nevertheless, if the Court were to find the 1992 Agreement ambiguous,

application of the third contract principle pronounced in *Mastrobuono* resolves the issue in Howsam's favor. DWR is bound by the common law rule of contract interpretation that "a court should construe ambiguous language against the interest of the party who drafted it." *Mastrobuono*, 514 U.S. at 62.

According to the *Restatement*,

> Where one party chooses the terms of a contract, he is likely to provide more carefully for the protection of his own interests than for those of the other party. He is also more likely than the other party to have reason to know of uncertainties of meaning. Indeed, he may leave meaning deliberately obscure, intending to decide at a later date what meaning to assert. In cases of doubt, therefore, so long as other factors are not decisive, there is substantial reason for preferring the meaning of the other party.

§ 206, comment a, *Restatement, Second, Contracts*.

That principle of law applies to the facts of this case. DWR has undoubtedly printed and executed hundreds of thousands of agreements exactly like the one at issue here. Inasmuch as the arbitration process is a creature of contract, as the Court has repeatedly held it is, DWR had the ability and opportunity to impose explicit conditions precedent to arbitration. *County of Rockland v. Primiano Constr. Co.*, 51 N.Y.2d 1, 9, 431 N.Y.S.2d 478, 482 (1980). *Mastrobuono* left open the possibility that a brokerage firm could draft a standard-form agreement that would clearly and unequivocally deprive the arbitrators of the authority to award punitive damages. Similarly, unless it ran afoul of regulatory requirements, DWR could have

provided clearly and unequivocally that a court would decide issues such as timeliness.

If it is arguable that the 1992 Agreement is unclear, DWR deliberately drafted it that way. It is logical to assume that DWR and other brokerage houses employ this tactic for one reason, to subject customers who sue them to prolonged and expensive litigation in order to wear them down and eventually force them to give up.

Howsam did not draft, edit, or alter any portion of the 1992 Agreement. Nor did she have the opportunity to influence the specific provision of the Code that now applies to her claim in arbitration. *Bybyk*, 81 F.3d at 1199. She, and many other customers like her, simply signed an agreement, as a precondition to doing business with DWR, which advised her that *all* disputes concerning her securities account must be handled through arbitration. DWR now seeks to enjoin the very same arbitration that it initially required as a prerequisite to doing business with it.

In a similar case against DWR, the Florida Court of Appeals stated:

> For its own purposes, Dean Witter *chose* to draft customer agreements requiring customers to submit to arbitration of 'any controversy.' It is not surprising that, in circumstances like those presented in this case, Dean Witter would now prefer the procedural and substantive advantages of a judicial forum for the prompt and dispassionate application of such legal defenses as the statute of limitations. But Dean Witter elected a different, nonjudicial forum for resolution of 'any controversy' with its customers. Having provided for arbitration in its customer

agreement, Dean Witter will have to trust the arbitrators to do their jobs properly.

Victor v. Dean Witter Reynolds, Inc., 606 So. 2d 681, 686 (Fla. Dist. App. 1992) (emphasis added).

B. The Plain Language of the Agreement Provides "Clear and Unmistakable" Evidence Of Intent to Arbitrate Timeliness

The language of the 1992 Agreement itself satisfies the "clear and unmistakable" standard. Thus, consideration of § 10324 may be unnecessary. The arbitration clause in the 1992 Agreement, a pre-printed form agreement prepared by DWR, similar to most standard arbitration clauses, provides that "*all* controversies" between Howsam and DWR, including the "construction . . . of this or any other agreement between" them "shall be determined by arbitration before any self-regulatory organization or exchange of which Dean Witter is a member." J.A. 7. The agreement also states that the "parties are waiving their right to seek remedies in court, including the right to jury trial." J.A. 6. The 1992 Agreement further states in paragraph 18 that "[t]his Agreement shall be construed and enforced in accordance with the laws of the State of New York without reference to choice of law doctrine." J.A. 6. This agreement has three significant features, each of which displays an intent to have the arbitrators decide questions arising under the eligibility rule.

1. The Broad Inclusive Agreement Demonstrates the Parties' Intent to Allow the Arbitrators to Decide Timeliness

The parties agreed, as broadly as possible, to the arbitration of "*all controversies*." The phrase "all controversies" presumably includes the controversy over who should determine timeliness of the claims. Indeed, inasmuch as agreements to arbitrate are "generously construed," *Mitsubishi*, 473 U.S. at 626, it is sensible to interpret "all controversies" to indicate, at a minimum, an intention to resolve through arbitration any dispute that would otherwise be settled in a court. *Mastrobuono*, 514 U.S. at 61 n.7.

Although neither *AT&T* nor *First Options* specifies language which would satisfy the "clear and unmistakable" standard, neither opinion implied that only an explicit statement in the contract would suffice. Here, the drafting party used the term "all" to define the scope of the arbitration agreement. The word "all" is defined as "wholly; completely; altogether; entirely." *Webster's Revised Unabridged Dictionary*, 1998. Without literally stating "the parties clearly and unmistakably intend for the arbitrators to decide issues arising under § 10304," it is difficult to imagine how the parties could more clearly have expressed their intentions.

This concept was addressed by the Second Circuit in *Bybyk*. In *Bybyk*, testing the pre-dispute arbitration agreement against the *First Options* standard of "clear and unmistakable" evidence that the parties agreed to submit arbitrability to the arbitrators, the Second Circuit found the plain language of the agreement all-encompassing. 81 F.3d at 1199-1200. The agreement at issue here is virtually identical to the agreement at issue

in *Bybyk*. The parties' broad grant of power to the arbitrators is unqualified by any express limitations or restrictions on either (1) the time to commence arbitration or (2) the arbitrators' power to determine eligibility rule issues. DWR is thus unable to overcome the presumption established in the 1992 Agreement that "all controversies" are to be arbitrated. Put another way, no draftsman seeking a six year limitation on the scope of arbitrability would craft this language to accomplish that objective. *Id.* at 1200.

2. The Parties Waived Their Right to Seek Redress in the Courts

By signing the agreement and assenting to its terms, the parties waived their right to seek redress in the courts of "all controversies" arising from the 1992 Agreement, including their right to jury trial. By its plain language, this provision operates as an outright waiver of DWR's right to seek judicial remedies preventing an alleged untimely claim from being submitted to arbitration, once the threshold issues of the existence of an agreement to arbitrate and subject matter are determined.

3. Interpretation Of the Agreement Is Governed By New York Law

In *Volt Information Sciences v. Board of Trustees*, 489 U.S. 468 (1989), the Court confirmed the principles that: (1) state, not federal, law generally governs construction of arbitration agreements under the FAA; (2) the FAA does not preempt the entire area of arbitration but only

requires that arbitration proceed in the manner agreed to by the parties, including, where applicable, the parties' choice of state arbitration law; and (3) although ambiguities in arbitration agreements must be resolved in favor of arbitration, the parties' intentions control and the courts' function is to enforce private arbitration agreements. *Id.* at 475-476.

Volt involved the interpretation of a construction contract, which, like the agreement in the instant case, contained an agreement to arbitrate all disputes arising out of the contract and a choice of law clause providing that the contract would be governed by the "law of the place where the project was located." In affirming the California Court of Appeals' decision to apply the California Arbitration Act to the parties' dispute, the Court explained, "the FAA does not require parties to arbitrate when they have not agreed to do so . . . . It simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms." *Id.* at 478. The California court stated:

> Where, as here, the parties have chosen in their agreement to abide by the state rules of arbitration, application of the FAA to prevent enforcement of those rules would actually be 'inimical to the policies underlying state and federal arbitration law' because it would 'force the parties to arbitrate in a manner inconsistent with their agreement.'

Id. at 472 (citations omitted).

In *Mastrobuono*, the Court reaffirmed its prior holdings in *Volt* that under the FAA, arbitration agreements must be enforced according to their terms, even if such

terms call for application of state arbitration law, and that judicial construction of contracts is a matter of state law. In that same vein, the Court, in *First Options*, affirmed the principle that arbitration agreements should generally be construed in accordance with state law principles of contract construction. "Arbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit." *Volt*, 489 U.S. at 479. Just as parties may limit by contract the issues which they will arbitrate, *Mitsubishi*, 473 U.S. at 626, so too may they specify by contract the rules under which the arbitration will be conducted. *Mastrobuono*, 514 U.S. at 61.

Howsam and DWR expressly agreed that New York law would govern the interpretation and enforcement of their dispute. In 1997, the New York Court of Appeals[6] decided *Smith Barney Shearson Inc. v. Sacharow*, 689 N.E.2d 884 (N.Y. 1997). In that case, following the Court's decisions in *Volt*, *Mastrobuono*, and *First Options*, the court stated that arbitrability is generally a matter for judicial determination but may be decided by arbitrators if the parties "clearly and unmistakably" so provide. *Sacharow*, 689 N.E.2d at 887-888. The court held that where the parties had agreed to arbitrate "any and all controversies," the issue of eligibility under § 10304 was arbitrable.

In the last paragraph of the opinion, Judge Bellacosa, writing for a unanimous court, stated:

[6]The New York Court of Appeals is that state's highest court.

> Lastly, it would be ironic and anomalous to permit parties from the securities industry, who generally derive benefits from the arbitration method they impose on their thousands of consumers, to elude the comprehensive language of their own industry-drafted arbitration agreements. Having agreed to plenary arbitration, they should not garner that strategic advantage against their aggrieved or dissatisfied customers.

Id. at 889.

Thus, by agreeing to arbitrate "all controversies" between the parties, including controversies arising from construction of the agreement, agreeing to waive its right to seek remedies in court, and agreeing to apply New York law, DWR intended that the arbitrators decide which claims are eligible for arbitration under § 10304.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests this Court to reverse the judgment of the Tenth Circuit and to order it to remand the case to the District Court for dismissal of DWR's action in accordance with its judgment.

Dated: Denver, Colorado

May 28, 2002

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 2002

KAREN HOWSAM,

Petitioner,

v.

DEAN WITTER REYNOLDS INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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QUESTION PRESENTED

Whether a court or an arbitration panel should determine the eligibility of petitioner's claims for submission to arbitration.

RULE 29.6 STATEMENT

Respondent Dean Witter Reynolds Inc. ("Dean Witter") is now known as Morgan Stanley DW Inc., and is wholly owned by Morgan Stanley, which is a publicly traded company.

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INTRODUCTION

The purpose of the Federal Arbitration Act, or "FAA," is to ensure judicial enforcement of arbitration agreements according to their terms. Consistent with that purpose, this Court has long held that "whether or not [a party] [i]s bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the Court," rather than an arbitration panel, "[u]nless the parties clearly and unmistakably provide otherwise." *AT&T Techs., Inc. v. Communications Workers of Am.*, 475 U.S. 643, 649 (1986) (internal quotes omitted).

In this case, the parties agreed not to arbitrate disputes more than six years old by incorporating into their agreement the National Association of Securities Dealers Code of Arbitration Procedure ("NASD Code"). Section 10304 of the NASD Code provides that "[n]o dispute" more than six years old "shall be eligible for submission to arbitration." Because this provision expressly precludes the *submission* of such claims to arbitration, it "can reasonably be read in only one way—as a substantive limit on the claims that the parties have contracted to submit to arbitration." *PaineWebber Inc. v. Hofmann*, 984 F.2d 1372, 1379 (3d Cir. 1993) (Becker, J.). The NASD itself has confirmed this point by explaining that Section 10304 is a "jurisdictional time limitation on the dispute[s] that could be arbitrated." 63 Fed. Reg. 588, 592 (Jan. 6, 1998).

As a threshold restriction on the arbitrability of particular disputes, Section 10304 is to be enforced by a court, not by an arbitration panel, unless the parties "clearly and unmistakably provide[d] otherwise." *AT&T*, 475 U.S. at 649. They did not. Nothing in the parties' arbitration agreement or the NASD Code evidences a "clear and unmistakable" intent that arbitrators are to decide the threshold question of arbitrability. The general provision upon which petitioner relies, stating that "all" disputes on

certain subjects are within the scope of arbitration, cannot trump the specific exclusion in Section 10304, and does not command that arbitrators decide their own jurisdiction.

Judicial enforcement of Section 10304 is necessary to effectuate its purpose. While securities claims are generally well-suited to arbitration, Section 10304 recognizes that long-stale claims are not. Arbitration is an equitable process, such that arbitrators are less inclined to follow bright-line rules such as statutes of limitations, and tend to proceed to the merits of even stale claims. Arbitral consideration of such claims is fundamentally unfair to parties that may no longer have access to materials needed to defend themselves because of the passage of time. Section 10304 was designed to address precisely this unfairness by ensuring that, after a certain point, long-stale disputes are no longer "eligible for submission to arbitration."

COUNTERSTATEMENT OF THE CASE

A. Petitioner's Claims

In 1992, the parties executed a customer service agreement that generally requires them to arbitrate disputes "before any self-regulatory organization or exchange of which Dean Witter is a member." Pet. App. 3; J.A. 6-7. In 1997, petitioner filed a Submission Agreement and a Statement of Claim with the NASD. *See* Pet. App. 4. In her Submission Agreement, petitioner represented that she had "read the procedures and rules of the [NASD] relating to arbitration," and agreed "to arbitration in accordance with the [NASD] Constitution, By-Laws, Rules, Regulations, and/or Code of Arbitration Procedure." *Id.* at 4-5; J.A. 24. The NASD Code specifies that:

> No dispute, claim, or controversy shall be eligible for submission to arbitration under this Code where six (6) years have elapsed from the occurrence or event giving rise to the act or dispute, claim or controversy. This Rule shall not extend applicable statutes of limitations, nor shall it apply to any case which is directed to arbitration by a court of competent jurisdiction.

NASD Code § 10304; J.A. 48.

Petitioner's Amended Statement of Claim alleges that in 1986—eleven years before petitioner filed her claim—Dean Witter and two of its brokers "breached their duty to recommend and sell only suitable investments" to petitioner. J.A. 20; *see also id.* at 8, 9, 10, 12, 20. Petitioner asserted that the investments were unsuitable in 1986 because they allegedly were dependent upon the performance of real estate markets, were illiquid and risky, and entailed excessive commissions and fees. *See id.* at 20.

B. The District Court Proceedings

Dean Witter filed a complaint in the United States District Court for the District of Colorado requesting declaratory and injunctive relief against the arbitration proceeding. *See* Pet. App. 5-6; J.A. 39-46. Dean Witter explained that petitioner's eleven-year-old claims are not eligible for submission to arbitration because they arose more than six years before she attempted to submit them to arbitration. J.A. 41-42.

Petitioner moved to dismiss the complaint on the ground that the parties had clearly and unmistakably agreed to arbitrate arbitrability issues. For that proposition, she relied on a New York case holding that, while Section 10304 presents an arbitrability issue, the parties in that case had clearly and unmistakably manifested an intent that arbitrators should decide the issue. *See Smith Barney Shearson Inc. v. Sacharow*, 689 N.E.2d 884 (N.Y. 1997). Dean Witter responded that this case is controlled by federal law, and that nothing in the parties' agreements clearly and unmistakably provides that arbitrators should determine arbitrability.

The district court (Miller, J.) agreed with petitioner and dismissed Dean Witter's complaint. *See* Pet. App. 31-37. The court determined that the parties' 1992 customer service agreement clearly and unmistakably manifests an intent to arbitrate arbitrability by requiring the parties to arbitrate "'all controversies' arising from their relationship" and stating that "'[t]he parties are waiving their right to seek remedies in court, including the right to a jury trial.'" *Id.* at 34 (quoting J.A. 6).

C. The Court of Appeals' Decision

The court of appeals (Ebel, J., joined by Lucero and Vratil, JJ.), reversed. *See id.* at 1-30. The court first examined this Court's long-established holding that "the question of whether the parties agreed to arbitrate [a particular claim] is to be decided by the court, not the arbitrator," "'[u]nless the parties clearly and unmistakably provide otherwise.'" *Id.* at 16 (quoting *AT&T Techs., Inc. v. Communications Workers of Am.*, 475 U.S. 643, 648, 649 (1986)). The court of appeals noted that it had previously decided that this standard applies to NASD Code § 10304. *See id.* at 17-19 (citing *Cogswell v. Merrill Lynch, Pierce, Fenner & Smith*, 78 F.3d 474, 478 (10th Cir. 1996)). The court explained that, in *Cogswell*, it had "analyz[ed] the specific language" of Section 10304 and concluded that it "'can reasonably be read in only one way—as a substantive limit on the claims that the parties have contracted to submit to arbitration.'" *Id.* at 18 (quoting *Cogswell*, 78 F.3d at 479). Thus, the *Cogswell* court had "adopted the majority view that the courts, and not arbitrators, should determine the arbitrability under NASD Code § 10304 of disputes submitted to arbitration, absent a 'clear and unmistakable' agreement to the contrary." *Id.*

Turning to this case, the court of appeals held that the parties had not clearly and unmistakably provided that arbitrators should decide arbitrability issues. The court

stressed that "the Supreme Court has stated that silence or ambiguity about the question who (primarily) should decide arbitrability should not be viewed as giving the arbitrators that power." *Id.* at 24 (internal quotation omitted). Instead, the "clear and unmistakable" standard is intentionally a "stringent" one because of "the particular difficulty in allowing arbitrators to decide the scope of their own jurisdiction." *Id.* at 16, 17.

On the facts of this case, the court of appeals held that the parties had not manifested a clear and unmistakable intent to allow arbitrators to decide arbitrability. The court explained that none of the contract provisions or NASD rules "refer[s] specifically to arbitrability." *Id.* at 27. The court of appeals was especially critical of the district court's reliance on a contract provision stating that the parties "waiv[ed] their right to seek remedies in court, including the right to a jury trial." *Id.* The court explained that "[a]t most, this language is ambiguous," given that an overly broad reading "would essentially nullify Howsam's arbitration rights entirely" by preventing her from seeking "an order compelling arbitration" or from obtaining "judicial enforcement of an arbitration award." *Id.* at 27-28. This, the court concluded, would prove too much. *See id.*

Finally, the court held that its conclusion was not affected by the New York Court of Appeals' decision in *Sacharow*. *See id.* at 19-24. The court explained that Dean Witter's complaint arises under the FAA, which "'create[s] a body of federal substantive law of arbitrability.'" *Id.* at 20 (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)). Thus, federal, not state, law controls. *See id.* at 23-24. Moreover, the court of appeals determined that "the *Sacharow* court gave insubstantial weight to the presumption established in *First Options* that parties to arbitration agreements generally intend arbitrability questions to be resolved by the courts." *Id.* at 24

n.7. Accordingly, the Tenth Circuit reversed and remanded. *Id.* at 30.

SUMMARY OF ARGUMENT

The court of appeals correctly held that courts, not arbitrators, should determine whether petitioner's claims are "eligible for submission to arbitration" under NASD Code § 10304. As this Court has explained, the "question of arbitrability—whether [the parties' agreement] creates a duty for the parties to arbitrate the particular grievance—is undeniably an issue for judicial determination." *AT&T Techs., Inc. v. Communications Workers of Am.*, 475 U.S. 643, 649 (1986). Although parties could contractually agree to allow arbitrators to decide arbitrability issues, "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) (quoting *AT&T*, 475 U.S. at 649). There is no such "clear and unmistakable" evidence here.

It is undisputed that the parties agreed to be bound by the NASD Code, such that "the parties' agreement and the arbitration code should be read together as a whole." Pet. Br. 33. It is also undisputed that Section 10304 of the NASD Code provides that disputes more than six years old are not "eligible for submission to arbitration." NASD Code § 10304. This textual articulation of a categorical exclusion of claims from arbitration is manifestly clear. Section 10304 pointedly excludes a specific class of claims—those more than six years old—from the scope of the parties' arbitration agreement. Under *First Options* and *AT&T*, this limitation is as fully enforceable as any other limitation on the scope of an arbitration agreement.

Indeed, the text, structure, and purpose of Section 10304 all point ineluctably to a clearly articulated intent to limit the arbitrability of stale disputes, not (as petitioner would have

it) to provide a statute-of-limitations defense for arbitrators to consider as part of an arbitration. The plain meaning of "[in]eligible for submission to arbitration" is that a dispute should not go to arbitration at all; it surely does not mean that the dispute should be submitted to arbitration, and then, after submission, the arbitrators should rule in the defendant's favor on timeliness grounds. Structural analysis confirms this point, as other portions of Section 10304 stress that the "applicable statute of limitations" derives from a different source of law, not from Section 10304 itself. Any lingering textual doubt is resolved by Section 10304's purpose "to prevent aged claims from being litigated *in arbitration*" because "the inherently equitable nature *of arbitration* pose[s] a greater risk that arbitrators might not strictly apply legal defenses such as statutes of limitation." 63 Fed. Reg. 588, 590 (Jan. 6, 1998) (emphasis added). Thus, as the NASD has explained, Section 10304 is a "jurisdictional time limitation on the dispute[s] that could be arbitrated." *Id.* at 592.

Petitioner attempts to evade this textually impelled conclusion by arguing that the "arbitrability" issues decided by courts are narrowly limited to the questions (i) whether the parties entered into an arbitration agreement, and (ii) whether the parties' dispute falls within the general "subject matter" of that agreement. This effort to circumvent judicial review has no foundation in law or policy. Fundamentally, judicial enforcement of arbitrability limitations is designed to protect parties from being forced to arbitrate disputes they did not agree to arbitrate. As a result, this Court has always recognized that the "arbitrability" inquiry entails consideration of *all* limitations on the scope of an arbitration agreement, not only those that petitioner would characterize as "subject matter" limits. *See, e.g., Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57-58 (1995). Petitioner's contrary position would not only artificially limit judicial protection against non-consensual arbitration, it

would also raise at least as many questions as it answers by relying on a semantic "subject matter" distinction that lacks both clarity and predictability of application.

By denigrating the parties' expressed intent in favor of an artificial "subject matter" test, petitioner would also jeopardize the rights of all parties to arbitration agreements— particularly (and ironically) consumers, who are the least likely to be sophisticated in legal matters and therefore the most likely to rely on the plain language of their agreements. While petitioner expresses concern that a threshold judicial determination could delay commencement of the arbitration process, it is in fact petitioner's approach that would spawn significant delay and expense. Unlike courts, arbitration panels "tend to delay eligibility decisions until the hearing on the merits," and thereby fail to provide an efficient threshold determination. 63 Fed. Reg. at 590. The best way to facilitate the dispute-resolution process is to interpret arbitration agreements faithfully in accordance with their terms, rather than to craft artificial rules such as petitioner's proposed "subject matter" test. As this Court has explained, the creation of a "new, unfamiliar test" in this area would "unnecessarily complicat[e] the law, and breed[] litigation from a statute that seeks to avoid it." *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 275 (1995).

Because Section 10304 limits the "arbitrability" of disputes, it should be applied by a court, not an arbitration panel, unless the parties clearly and unmistakably agreed otherwise. They did not. By adopting Section 10304, the parties evidenced an intent that courts, not arbitrators, should apply the six-year time-bar. The other provisions relied on by petitioner are irrelevant because they do not specifically address the question who decides eligibility. Thus, they cannot overcome the *AT&T/First Options* presumption. Petitioner's purported reliance on New York state law is especially unavailing because this case is governed by federal (not state) law, and the New York case on which she

relies was decided under a mistaken view of federal (not state) law in any event.

While the court of appeals' decision is correct under this Court's precedents, the Court should dismiss the petition as improvidently granted. Since the Court granted *certiorari*, the NASD and the SEC have taken steps to amend Section 10304. As a result, a decision in this case would have little practical significance. The matter surely no longer rises to the level demanded by Rule 10. *See* S. Ct. R. 10.

ARGUMENT

I. A COURT MUST DECIDE WHETHER PETITIONER'S CLAIM IS ELIGIBLE FOR SUBMISSION TO ARBITRATION UNDER NASD CODE § 10304.

Federal law provides that parties cannot be compelled to arbitrate disputes unless they have agreed to do so. To ensure that a dispute is not submitted to arbitration in contravention of the parties' agreement, a court in the first instance must determine the arbitrability of a particular dispute unless the agreement expresses a clear and unmistakable intent that arbitrators should make that threshold determination.

Here, the parties agreed to be bound by Section 10304 of the NASD Code. Section 10304 expressly states that "[n]o dispute" more than six years old "shall be eligible for submission to arbitration." Nowhere in their agreement did the parties "clearly and unmistakably" provide that arbitrators, and not a court, would enforce this limitation on arbitrability. Accordingly, the court of appeals correctly held that a court must determine whether petitioner's claim is eligible for submission to arbitration under Section 10304.

A. Courts decide issues of arbitrability absent "clear and unmistakable" intent to the contrary.

Two fundamental principles of federal law govern resolution of this case. First, the parties to an arbitration agreement are free to limit the scope of arbitration in any way they choose, and all limitations on the scope of arbitration are to be enforced according to the terms of the parties' agreement. Under the FAA, arbitration "is a way to resolve those disputes—*but only those disputes*—that the parties have agreed to submit to arbitration." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) (emphasis added); *accord, e.g., AT&T Techs., Inc. v. Communications Workers of Am.*, 475 U.S. 643, 649 (1986). Because arbitration is a matter of contract, the intent of the contracting parties—as expressed in the terms of the arbitration agreement—determines the extent of a party's duty to arbitrate. The FAA does not "prevent parties who do agree to arbitrate from excluding certain claims from the scope of their arbitration agreement." *Volt Info. Sciences, Inc. v. Board of Trs. of Stanford Univ.*, 489 U.S. 468, 478 (1989). Nor does it prevent parties from excluding specific "issues" from their arbitration obligations. *First Options*, 514 U.S. at 945. And "[j]ust as [parties] may limit by contract the issues which they will arbitrate, so too may they specify by contract the rules under which that arbitration will be conducted." *Volt*, 489 U.S. at 479.

Second, to ensure that parties are not subjected to arbitration beyond the scope of their agreement, federal law presumes that a court in the first instance, rather than arbitrators, will make the threshold determination whether a particular dispute is within the scope of arbitration. As this Court has explained, the "question of arbitrability—whether [the parties' agreement] creates a duty for the parties to arbitrate the particular grievance—is undeniably an issue for judicial determination." *AT&T*, 475 U.S. at 649. Thus, "whether or not [a party] [i]s bound to arbitrate, *as well as*

what issues it must arbitrate, is a matter to be determined by the Court." *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 241 (1962) (emphasis added); *see also International Union of Operating Eng'rs v. Flair Builders, Inc.*, 406 U.S. 487, 491 (1972); *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 546-47 (1964); *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582 (1960). As with other arbitration issues, parties are free to express a contrary intent, but "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless—there is 'clea[r] and unmistakabl[e]' evidence that they did so." *First Options*, 514 U.S. at 944 (quoting *AT&T*, 475 U.S. at 649).

The presumption that courts, not arbitrators, will decide issues of arbitrability is exceedingly difficult to overcome. As this Court has explained, "[t]he willingness of parties to enter into agreements that provide for arbitration of specified disputes would be drastically reduced … if [an] arbitrator had the power to determine his own jurisdiction." *AT&T*, 475 U.S. at 651 (internal quotation omitted). Arbitrators would be able to assert jurisdiction against parties' wills and render virtually unreviewable decisions on any number of issues affecting the parties' livelihoods. *See id.* Because judicial enforcement of the limitations on arbitration agreements increases the willingness of parties to enter into such agreements, it is emphatically pro-arbitration.

Although conceivably parties might desire that arbitrators resolve arbitrability issues, it cannot be assumed in the absence of an affirmative and specific expression of intent that any party would deliberately choose that course. Indeed, it is likely that "[a] party often might not focus upon th[e] question [of who decides arbitrability] or upon the significance of having arbitrators decide the scope of their own powers." *First Options*, 514 U.S. at 945. This is particularly true for individual consumers and others who are not sophisticated in legal matters. *See generally* Br. for *Amici Curiae* Trial Lawyers for Public Justice and AARP.

As a result, "silence or ambiguity" in the parties' agreement is insufficient to permit arbitrators to determine their own jurisdiction. *First Options*, 514 U.S. at 945. Only a "clear and unmistakable" expression of intent can divest a party of the protections that come with judicial enforcement of threshold limits on arbitrability. *Id.* at 944 (brackets omitted).

B. Section 10304 is a restriction on "arbitrability."

Under these principles, Section 10304 presents an "arbitrability" issue presumptively for judicial resolution. It is common ground that the parties agreed to be bound by the NASD Code, including Section 10304. *See* Pet. Br. 32, 33; *see also* SEC Br. 9 ("The agreement … incorporates all the NASD arbitration rules"). Petitioner has never disputed this point, in the district court, in the court of appeals, or in this Court. To the contrary, she has acknowledged that "the parties' agreement and the arbitration code should be read together as a whole." Pet. Br. 33; *see also id.* at 32 ("pre-dispute arbitration agreements and the Code should be construed as a single writing and interpreted as a whole").

Read in this manner, the arbitration agreement and the NASD Code provide that certain disputes are eligible for submission to arbitration *unless* they are more than six years old. The parties' 1992 agreement states that, in general, "all controversies" of certain types should be arbitrated. *See* Pet. App. 3-4; J.A. 6-7. Section 10304 then provides a specific exception to this general rule by stating that "*[n]o* dispute, claim, or controversy shall be eligible for submission to arbitration" if it arose more than six years before the claim is filed. J.A. 48 (emphasis added). This specific provision excludes from the general scope of arbitration a particular class of disputes—namely, those of a particularly stale vintage—and this specific exclusion must be given effect. *See Mastrobuono*, 514 U.S. at 63 (holding that an arbitration agreement must be "read to give effect to all its provisions

and to render them consistent with each other"); *Department of Housing & Urban Dev. v. Rucker*, 122 S. Ct. 1230, 1233, 1235 (2002) (holding that statute was "unambiguous[]," in part because a "general statutory provision … cannot trump the clear language" of a "more specific" one).

Petitioner and the SEC nonetheless argue that the application of Section 10304 is not a matter of arbitrability because Section 10304 presents, in their view, a "procedural" rather than "subject matter" limitation. *See, e.g.*, Pet. Br. 23-24, 27; SEC Br. 13-14. As we explain below, this attempt to narrow dramatically the *AT&T/First Options* line of cases, and thus shrink significantly the sphere of judicially enforceable limits on arbitrability, does not withstand scrutiny. *All* restrictions on the scope of arbitration present threshold issues of "arbitrability." Once "arbitrability" is properly defined, the conclusion ineluctably follows that Section 10304 raises such an issue. The text, structure, and purpose of Section 10304 all confirm that it is and was intended to be a restriction on the scope of disputes that are subject to arbitration. This conclusion is buttressed by important policy considerations undergirding the FAA and the NASD arbitration scheme.

1. The concept of "arbitrability" encompasses all restrictions on the scope of arbitration.

a. "[A]rbitrability" refers simply to "whether [an] agreement creates a duty for the parties to arbitrate the particular grievance." *AT&T*, 475 U.S. at 649. This inquiry encompasses the questions "whether or not the [party] was bound to arbitrate, as well as what issues it must arbitrate." *Atkinson*, 370 U.S. at 241; *see also First Options*, 514 U.S. at 942 (question is "whether a party has agreed to arbitrate"); *John Wiley & Sons*, 376 U.S. at 546-47 (same); *Warrior & Gulf*, 363 U.S. at 582 (question is whether party agreed "to submit to arbitration [the] dispute"). Thus, the "arbitrability"

inquiry broadly entails consideration of *all* restrictions on the scope of arbitration under the parties' agreement.

b. The arguments of petitioner and the SEC, on the other hand, are premised on an artificially narrow concept of arbitrability that cannot be squared with this Court's precedents. In their view, the domain of arbitrability presumptively reserved for judicial resolution is confined to determining (i) whether the parties have entered into an arbitration agreement and, if so, (ii) whether the substance of a given dispute falls generally within the "subject matter" of that agreement. According to this approach, all other restrictions on or exclusions from the scope of arbitration are to be treated as procedural defenses reserved for decision by arbitrators. *See* Pet. Br. 19; *see also id.* at 23-25; SEC Br. 14, 16.

This cramped concept of arbitrability is off the mark. The Court has never suggested that arbitrability may be artificially confined to a mere "subject matter" determination. Nor does the dictionary definition of "arbitrable"—"subject to decision by arbitration"—draw any distinction based on the *reason* a dispute is subject to arbitration, be it the "subject matter" of the dispute or some other criterion. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, UNABRIDGED (1976); *see also* MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (10th ed. 1997); THE COMPACT OED (2d ed. 1991); RANDOM HOUSE UNABRIDGED (2d ed. 1987). Simply put, arbitrability is not the limited term of art that petitioner and the SEC frame it to be.

A common-sense concept of arbitrability that reaches all restrictions on the scope of arbitration follows naturally from the fundamental principle underlying the FAA—that parties should be required to arbitrate a dispute if and only if they agreed to do so. Whether a particular restriction on arbitration is characterized as a "subject matter" limitation, a "procedural" limitation, or some other type of limitation is

entirely irrelevant to this bedrock principle. To ensure that parties agreed to arbitrate a dispute, the courts need to enforce *all* restrictions on the scope of the parties' arbitration agreement.

Petitioner's contrary definition of arbitrability is so contrived that she has difficulty precisely stating it. At times, petitioner and the SEC argue for a *per se* rule that time limits can never be "arbitrability" limits enforced by courts. *See, e.g.*, Pet. Br. 23-24; SEC Br. 7, 16. At other points, they recognize that the parties' intent is relevant, and suggest that their rule is only a presumption. *See, e.g.*, Pet. Br. 29; SEC Br. 17 n.5. They then go on, however, to suggest that their "presumption" is effectively unrebuttable. They accomplish this by essentially ignoring the language of Section 10304. *See, e.g.*, Pet. Br. 28-29; SEC Br. 25-26. Indeed, the SEC explicitly refuses to "treat[] a timeliness requirement as an issue of arbitrability merely because the timeliness requirement is phrased in certain language." SEC Br. 8. Petitioner likewise argues that her "subject matter"/procedure dichotomy controls "[n]otwithstanding" the text of Section 10304. Pet. Br. 7. In other words, the petitioner and the SEC admit that their position is not based on the parties' expressed intent. That position is fatally flawed, inasmuch as arbitration is "a matter of consent, not coercion." *Volt*, 489 U.S. at 479.[1]

Furthermore, petitioner's "subject matter" distinction rests on semantics. Petitioner appears to assume that the

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[1] Petitioner and the SEC attempt to downplay their anti-textualism by asserting that "[o]nce it is established that the arbitrators have jurisdiction of the subject matter, leaving issues such as timeliness to the arbitrators raises no cause for concern that arbitration is being imposed on a non-consenting party." Pet. Br. 24; *see also* SEC Br. 22. But this *ipse dixit* simply begs the question whether the parties consented to arbitrate certain (as here, stale) disputes. That question turns on the parties' expressed intent, which is embodied in Section 10304.

"subject matter" at issue here is the recommendation and sale of securities to petitioner by Dean Witter brokers. But the "subject matter" could be defined just as easily as the recommendation and sale of securities to petitioner by Dean Witter brokers within the past six years. At least one circuit has construed the "subject matter" of a dispute in precisely that way. *See General Drivers, Warehousemen & Helpers, Local Union 89 v. Moog Louisville Warehouse*, 852 F.2d 871, 874 (6th Cir. 1988) ("we construe the 'subject matter' of the dispute in the instant case to be whether or not the union filed a timely notice of arbitration"). Thus, petitioner's semantic exercise raises at least as many questions as it answers. This point is illustrated by *Riley Mfg. Co. v. Anchor Glass Container Corp.*, 157 F.3d 775 (10th Cir. 1998), where the court of appeals engaged in an extensive analysis of the "subject matter" of an agreement, *see id.* at 782-84, and still ended up remanding for further fact-finding on whether the plaintiff's claims "relate[d] to the 'subject matter' of the [parties'] contract." *Id.* at 784. Although arising in a different context, *Riley* illuminates the inherent indeterminacy of petitioner's "subject matter" concept of arbitrability.

c. Petitioner's semantic distinction marks such a sharp break from this Court's jurisprudence that it is refuted by the very cases on which she relies. Petitioner points primarily to *John Wiley & Sons*, but the Court in *Wiley* held that it had "no doubt" that "a compulsory submission to arbitration cannot precede judicial determination that the [parties'] agreement does in fact create such a duty." 376 U.S. at 546-47. Petitioner quotes out of context a passage from *Wiley* in which the Court stated that "[o]nce it is determined ... that the parties are obligated to submit the subject matter of a dispute to arbitration, 'procedural' questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator." *Id.* at 557 (quoted in Pet. Br. 23-24). But *Wiley* held only that, *if* the parties have agreed to arbitrate a

dispute, genuinely procedural questions should be decided by the arbitrators as part of their arbitration proceedings. It never held that all issues other than "subject matter" are invariably "procedural" issues for arbitral resolution.

This point is confirmed by *Wiley*'s own treatment of a timeliness issue. After holding that courts must resolve "arbitrability" issues, *id.* at 546-47, the Court in *Wiley* considered whether petitioner's claims fell within the temporal scope of the parties' agreement. *See id.* at 554-55. The Court held that the dispute was arbitrable because "[c]laimed rights during the term of the agreement, at least, are unquestionably within the arbitration clause," and the Court did not read the plaintiff's arbitration request to assert other claims outside of that time frame. *Id.* In sum, the Court considered a timeliness issue as an "arbitrability" issue for judicial resolution pursuant to the parties' expressed intent; it did not use an artificial "subject matter"/procedure distinction to override that intent, as petitioner and the SEC urge here.

The SEC's reliance on *International Union of Operating Engineers v. Flair Builders, Inc.*, 406 U.S. 487 (1972), is equally misplaced. In that case, this Court stressed that "the scope of the arbitration clause ... remains a matter for judicial decision." *Id.* at 491. The Court then held that the defense of laches was "an arbitrable question under the [parties'] agreement" because the agreement "extends to 'any difference' between" the parties, and "[t]here is nothing to limit the sweep of this language or to except any dispute or class of disputes from arbitration." *Id.* at 491-92. In other words, this Court assumed that restrictions on the timeliness of disputes can present "arbitrability" issues for judicial resolution, but determined that the parties in that case had expressed an intent to arbitrate timeliness because (unlike here) they had not incorporated into their agreement a provision excluding untimely disputes from arbitration.

The SEC claims that *Flair Builders* did not present "a question of arbitrability" because "the Court did not require a 'clear' indication that the parties had … agreed" to submit the issue to arbitrators. SEC Br. 18-19. But that puts matters backwards. The "clear and unmistakable" presumption applies to whether the parties agreed to submit arbitrability to arbitrators, not to whether an issue is an arbitrability issue in the first place. *See, e.g., First Options*, 514 U.S. at 944-45. Indeed, the key point about *Flair Builders* is that the Court followed the plain meaning of the parties' arbitration agreement without applying any special presumptions with respect to timeliness issues. *Flair Builders* therefore refutes the SEC's argument that restrictions on timeliness can never be considered arbitrability issues, regardless of the parties' expressed intent.

This point is confirmed by *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995). The question in *Mastrobuono* was whether arbitrators could award punitive damages. Under the test proposed by petitioner and the SEC, that question would always be resolved by arbitrators, not courts, because the availability of punitive damages is not a "subject matter" issue. But far from relying on such a test, this Court held that "the case before us comes down to what *the contract* has to say about the *arbitrability* of petitioners' claim for punitive damages." 514 U.S. at 58 (emphasis added). "[I]f the contract says 'no punitive damages,' that is the end of the matter, for courts are bound to interpret contracts in accordance with the expressed intentions of the parties—even if the effect of those intentions is to limit arbitration." *Id.* at 56-57. So too here, Section 10304 states that "[n]o" dispute more than six years old is "eligible for submission to arbitration," J.A. 48, and under *Mastrobuono*, "that is the end of the matter." 514 U.S. at 57.

Instead of acknowledging *Mastrobuono's* holding, petitioner relies on a footnote from *Mastrobuono* quoting

Moses H. Cone for the proposition that "'doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of *waiver, delay, or a like defense to arbitrability.*'" 514 U.S. at 62 n.8 (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.* 460 U.S. 1, 24-25 (1983)) (emphasis added); Pet. Br. 26. This footnote only confirms, however, that non-"subject matter" limitations, including timeliness limitations, are *not* governed by a special standard. Instead, they *can* be "defense[s] to arbitrability," depending on the parties' intent. *Id.* Whether or not that intent is subject to the normal presumption in favor of arbitrability is beside the point, because the text, structure, and purpose of Section 10304 easily overcome any such presumption, as we explain below. The key point is that petitioner's attempt to manufacture some *heightened* presumption with respect to timeliness and other non-"subject matter" issues runs contrary to this Court's jurisprudence, including the very cases on which petitioner and the SEC rely.

2. Text, structure and purpose all confirm that Section 10304 is a restriction on arbitrability.

Once the legal concept of arbitrability is put on proper footing under this Court's precedents, it becomes abundantly clear that the question whether petitioner's claim is time-barred under Section 10304 is an issue of arbitrability. The text, structure, and purpose of Section 10304 all confirm this.

a. A straightforward reading of the text establishes that Section 10304 entirely excludes a class of disputes from the scope of arbitration and is therefore a restriction on arbitrability. Section 10304 states that claims more than six years old are not "eligible for submission to arbitration." J.A. 48. The plain meaning of not "eligible for submission to arbitration" is that a dispute should not be considered by arbitrators. As now-Chief Judge Becker explained in

construing the New York Stock Exchange's identical Rule 603:

> "Eligible" is defined as "fitted or qualified to be chosen or used" or "worthy to be chosen or selected." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 736 (1966). "Submission" is defined as the act of "commit[ting something] for consideration, study, or decision." *Id.* at 2277. Interpolating these definitions into the text of Rule 603, the relevant portion of the rule would state that, after six years, *a dispute "shall [not] be worthy to be chosen or selected for [the] consideration, study, or decision [of] arbitration."* We think this expanded reading of Rule 603 unambiguously supports ... the district court's conclusion that the parties intended to bar from arbitration disputes raised more than six years after the events giving rise to them.

PaineWebber Inc. v. Hartmann, 921 F.2d 507, 513 (3d Cir. 1990) (emphasis added).

As Judge Becker's textual analysis demonstrates, Section 10304's use of the term "submission" should be dispositive. The prohibition against "submission" of time-barred disputes to arbitrators means that such disputes cannot be "commit[ted]" to the jurisdiction of arbitrators for "consideration, study, or decision" by them. *Id.* Thus, absent clearly expressed intent to the contrary, arbitrators have no power to decide any aspect of a dispute barred by Section 10304. Such a dispute is simply not "eligible for submission to arbitration."

In the context of defining the jurisdiction of arbitrators and the scope of arbitrability, Congress, this Court and the NASD have all recognized and applied this same common-

sense understanding of the key term "submission." Congress employed the term "submitted" in the FAA to describe the boundaries of arbitral jurisdiction. *See* 9 U.S.C. § 11 (court may modify award if "the arbitrators have awarded upon a matter not submitted to them"). This Court's arbitrability cases have likewise used the term "submit" or "submission" in describing whether parties agreed to arbitrate a dispute. *See, e.g., First Options*, 514 U.S. at 945 ("a party can be forced to arbitrate only those issues it specifically has agreed to *submit* to arbitration") (emphasis added); *AT&T*, 475 U.S. at 648-49 ("arbitrators derive their authority to resolve disputes only because the parties have agreed in advance to *submit* such grievances to arbitration") (emphasis added); *John Wiley & Sons*, 376 U.S. at 547 ("compulsory *submission* to arbitration cannot precede judicial determination that the [parties' agreement] does in fact create such a duty") (emphasis added); *Atkinson*, 370 U.S. at 243 (holding that the parties' agreement did not provide for "the *submission* of grievances" to arbitration) (emphasis added); *Warrior & Gulf*, 363 U.S. at 582 ("a party cannot be required to *submit* to arbitration any dispute which he has not agreed so to submit") (emphasis added).

Other provisions of the NASD Code likewise employ variants on the phrase "eligible for submission" to describe the arbitrators' subject matter and personal jurisdiction. *See, e.g.*, NASD Code § 10101 ("Matters Eligible for Submission" include disputes regarding specified subject matters between specified types of persons); § 10336(a) (imposing amount-in-controversy limitation for claims "eligible to be heard by a single arbitrator"). Indeed, the Code expressly equates "eligibility" with "arbitrability" by providing that "a dispute, claim, or controversy eligible for submission ... shall be arbitrated ...." NASD Code § 10201(a); *see also* § 10301(a) (same). This consistency of usage further confirms the natural meaning of the pivotal terms at issue.

The language of the NASD Code, grounded in the terminology of the FAA and this Court's jurisprudence, is further illuminated by petitioner's own actions. Specifically, petitioner attempted to commence arbitration by filing a "SUBMISSION AGREEMENT" stating that she "submit[ted] the present matter in controversy ... to arbitration." J.A. 24. That is precisely what she was not permitted to do, inasmuch as Section 10304 renders this case "[in]eligible for *submission* to arbitration." J.A. 48 (emphasis added). Petitioner now finds herself arguing, oddly, that she is free to "submit[]" to arbitration a dispute that is ineligible for "submission to arbitration."

b. Section 10304's plain meaning is confirmed by its structure. After providing that claims more than six years old are not "eligible for submission to arbitration," Section 10304 goes on to specify that the six-year exclusion does not operate to "extend applicable statutes of limitations." J.A. 48. The section by its own terms thereby confirms that the six-year time bar is *not* the same as an "applicable statute[] of limitations." *Id.* Instead, limitations periods are drawn from state or federal law and are in no wise superseded or affected by Section 10304. This structural point refutes petitioner's assertion that Section 10304 should be treated as "a defense [to a claim] similar to statutes of limitation or repose," instead of as a threshold restriction on arbitral jurisdiction. Pet. Br. 7.

Section 10304 concludes by stating that it does not "apply to any case which is directed to arbitration by a court of competent jurisdiction." J.A. 48. This further confirms that Section 10304 is not merely a statute of limitations defense to be raised during an arbitration. If it were, there would be no reason to make it inapplicable to cases directed to arbitration by courts. It is precisely because Section 10304 is a limit on arbitrability itself that it was necessary for the NASD to specify that arbitrators should not apply the

section once a court has determined a dispute to be arbitrable.

c. If there were any lingering doubt whether Section 10304 is a restriction on arbitrability, it would be dispelled by the purposes underlying that section. Contrary to petitioner's suggestion, Section 10304 was not designed to provide a supplemental statute of limitations. As petitioner concedes, six years is longer than most, if not all, statutes of limitations that might apply to disputes under the parties' agreement. *See* Pet. Br. 15; *Ohio Co. v. Nemecek*, 98 F.3d 234, 236-37 (6th Cir. 1996).[2] If Section 10304 were intended to establish a new, private statute of limitations to supersede any other applicable statute of limitations that might exceed six years, then the SEC presumably would have disapproved the rule or subsequently invalidated it. *Cf. Shearson Am. Express, Inc. v. McMahon*, 482 U.S. 220, 233-34 (1987) (describing the SEC's "broad authority to oversee and regulate the rules" of the NASD). Far from doing so, the SEC has recognized that Section 10304 differs from a statute of limitations in that "a claim can be barred by a statute of limitations and yet satisfy the time limit imposed by the rule, or vice versa," and that while "a statute of limitations affects a party's right to recover in any forum ... Rule 10304 provides only that certain claims are not eligible for arbitration under the NASD Code." SEC Br. 26 (internal quotation and brackets omitted).

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[2]The limitations period for most securities claims is three years or less. *See* 67 Fed. Reg. 19,464, 19,466 & n.15 (Apr. 19, 2002). Under New York law, six years exceeds even the limitations period for intentional torts, *see* N.Y. C.P.L.R. § 215 (one year), and for all but the most serious felonies, *see* N.Y. Crim. Pro. § 30.10(2)(b) (five years). It is also equal to the residual limitations period for cases to which no specific period applies. *See* N.Y. C.P.L.R. § 213. Simply put, the six-year limit is far too generous to reflect an intent to shorten the applicable limitations period.

These differences point to Section 10304's basic office to protect against the unfairness of submitting stale cases to arbitrators. While securities claims are generally well-suited to arbitration, old ones are not. As the NASD has explained, "the securities industry believed that the inherently equitable nature of arbitration posed a greater risk that arbitrators might not strictly apply legal defenses such as statutes of limitation." 63 Fed. Reg. 588, 589 (Jan. 6, 1998). Arbitrators' consideration of old claims could be fundamentally unfair to a firm that no longer had access to the materials it needed to defend itself—because documents are generally destroyed after six years pursuant to the SEC's document-retention rules; because the increasing mobility of brokers within the industry means that brokers often leave their firms within six years; and because of all the more general reasons that statutes of limitations exist. *See id.* at 589, 591 (citing SEC Rule 17a-4, 17 C.F.R. § 240.17a-4). In addition, securities firms have long understood that "uncertainty about arbitrator application of statutes of limitation makes analyzing the risks of litigating a claim much more difficult and makes decisions about disposing of records much riskier." *Id.* at 591. Significantly, these concerns reflect the unfairness inherent in submitting long-stale cases *to arbitrators*, rather than to courts. *See* Br. for the Securities Industry Ass'n as *Amicus Curiae* at 12-13, 16-18.

Not surprisingly, therefore, the SEC ultimately concedes that Section 10304 "reflect[s] a judgment that claims that were more than six years old could be unsuitable *for arbitration*." SEC Br. 24 (emphasis added). Petitioner likewise recognizes that the rule was designed "to prevent stale claims *from going to arbitration*." Pet. Br. 15 (emphasis added). Section 10304's purpose to prevent *arbitrators* from considering stale claims can be effectuated *only* by interpreting it, according to its plain terms, to be a judicially enforceable restriction on arbitrability.

For that reason, the NASD has explained that the rule is a "substantive jurisdictional time limitation on the dispute[s] that could be arbitrated." 63 Fed. Reg. at 592. Although the SEC opines that this statement is "unclear," SEC Br. 24 n.8, it could scarcely be clearer: the NASD said that the rule is a "jurisdictional" limit on the disputes that can be "arbitrated." 63 Fed. Reg. at 592. Thus, the NASD has confirmed that, unless the parties agreed otherwise, *"the courts* determine the scope of the agreement to arbitrate, *including whether a matter is eligible for arbitration on subject matter, timeliness, or other grounds*." 59 Fed. Reg. 39,373, 39,374 (Aug. 2, 1994) (citing *AT&T*, 475 U.S. at 649) (emphasis added);[3] *see also* 63 Fed. Reg. at 594 (stressing "the difference between eligibility and statutes of limitation, a distinction that has occasionally been overlooked by courts, arbitrators, and other participants"). While these explanatory statements could not alter the plain language of Section 10304, they strongly confirm that the section means what it says. Disputes more than six years old are simply not "eligible for submission to arbitration."

d. Significantly, petitioner and the SEC have little to say with respect to these interpretive points. They seek refuge in the general presumption that "'doubts concerning the scope

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[3] Petitioner and the SEC ignore this clear statement and instead rely on the NASD's separate statement that, on its face, "'Section [10304] does not specify who has the authority to determine if a claim is eligible for submission to arbitration.'" Pet. Br. 28 (quoting 59 Fed. Reg. at 39,373-74); SEC Br. 24 n.8. That statement is irrelevant to the question whether Section 10304 governs arbitrability or instead provides a statute-of-limitations defense. Instead, it speaks to the distinct question who decides arbitrability issues under Section 10304. On that question, the NASD's statement is of no benefit to petitioner because silence on the question who decides arbitrability cannot overcome the presumption that courts decide such issues. *See, e.g., First Options*, 514 U.S. at 944. That is precisely why the NASD recognized that, under the current version of its rules, courts are to apply the time-bar absent a contrary agreement by the parties. *See* 59 Fed. Reg. at 39,374.

of arbitrable issues should be resolved in favor of arbitration.'" Pet. Br. 26 (quoting *Mastrobuono*, 514 U.S. at 62 n.8). But they cannot point to anything in the text, structure or purpose of Section 10304 that creates *any* doubt that "eligible for submission to arbitration" means anything other than what it says. As this Court very recently stressed, courts cannot "override the clear intent of the parties, or reach a result inconsistent with the plain text of the contract, simply because the policy favoring arbitration is implicated." *EEOC v. Waffle House*, 122 S. Ct. 754, 764 (2002); *see also id.* at 762; *Volt*, 489 U.S. at 476; *Hartmann*, 921 F.2d at 513 ("a compelling case for nonarbitrability should not be trumped by a flicker of interpretive doubt").

Far from discerning a genuine ambiguity in Section 10304, petitioner claims only that ineligible for "submission to arbitration" could mean ineligible for "'submission for full adjudication of the merits, rather than submission for preliminary determinations.'" Pet. Br. 28 (quoting *PaineWebber Inc. v. Elahi*, 87 F.3d 589, 600 (1st Cir. 1996)). That reading makes little sense. If a case is ineligible for full submission on the merits, it is by definition ineligible for submission on preliminary issues such as arbitrability. There would be no reason for an arbitrator to decide "preliminary" issues if the arbitration could not go forward on the merits.

The SEC does not even mount a textual argument. Instead, it anti-textually asserts that "Rule 10304 could easily have been phrased" differently. SEC Br. 25; *see also id.* at 26. That merely says that the parties could have expressed a different intent than they did. The SEC also argues that the courts of appeals are in near-unanimous agreement that statutes of limitations—as opposed to limits on eligibility for submission to arbitration—should be decided by arbitrators. *See* SEC Br. 23. But by resting its position on cases addressing differently worded provisions with different purposes, while refusing to consider the text of Section 10304, the SEC essentially assumes its own conclusion.

Simply put, no one has identified a plausible textual basis, or any other persuasive ground, for holding that Section 10304 is anything other than a jurisdictional bar.[4] As the court of appeals correctly held, Section 10304 "can reasonably be read in only one way—as a substantive limit on the claims that the parties have contracted to submit to arbitration." Pet. App. 18a (internal quotations omitted).[5]

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[4] Of the eight courts of appeals that have considered this issue, five, including the Tenth Circuit, have so held. *See* Pet. App. 18a; *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cohen*, 62 F.3d 381, 384 (11th Cir. 1995); *PaineWebber Inc. v. Hofmann*, 984 F.2d 1372, 1378-79 (3d Cir. 1993); *Roney & Co. v. Kassab*, 981 F.2d 894, 898 (6th Cir. 1992); *Edward D. Jones & Co. v. Sorrells*, 957 F.2d 509, 512-13 (7th Cir. 1992). Of the other three courts of appeals, two did not consider Section 10304's text; they simply held that all time limits are presumptively defenses for arbitrators to apply. *See Smith Barney Shearson, Inc. v. Boone*, 47 F.3d 750, 754 (5th Cir. 1995); *O'Neel v. NASD*, 667 F.2d 804, 807 (9th Cir. 1982). The remaining court relied on a similar presumption, the particularly weak and unpersuasive textual analysis discussed on page 26 above, and a handful of other considerations. *See Elahi*, 87 F.3d at 600.

[5] If petitioner were correct that this case must be resolved based on her proposed "subject matter"/procedure dichotomy, this case would still present an arbitrability issue for the courts. Although Section 10304 does not fall neatly into either of petitioner's two categories, it is far more like a "subject matter" limitation than a procedural one. It is not designed to govern the conduct of proceedings before arbitrators, but instead is designed to determine which cases should be decided by arbitrators in the first instance. This is confirmed by the SEC's reliance on statute-of-limitations cases, *see, e.g.*, SEC Br. 23, because in other contexts where a distinction between "substance" and "procedure" does matter, the courts have held that while statutes of limitations are "procedural," statutes of repose are "substantive." *See, e.g., First United Methodist Church of Hyattsville v. United States Gypsum Co.*, 882 F.2d 862, 865-66 (4th Cir. 1989). Section 10304 is far more analogous to a statute of repose than a statute of limitations because it imposes an absolute time bar that is not subject to tolling. *See, e.g., Prudential Secs., Inc. v. Yingling*, 226 F.3d 668, 672 n.4 (6th Cir. 2000); *Cohen*, 62 F.3d at 385 n.4 (citing cases); *see generally Short v. Belleville Shoe Mfg. Co.*, 908 F.2d 1385, 1391-92 (7th

3. Policy considerations confirm that Section 10304 is a restriction on arbitrability.

Petitioner urges the Court to depart from both well-established precedent and the language and intent of Section 10304 on the basis of ill-conceived policy arguments this Court has repeatedly rejected. By denigrating the parties' expressed intent, petitioner would jeopardize the rights of all parties to arbitration agreements, particularly (and ironically) consumers. Although petitioner expresses concern that a threshold judicial determination could delay commencement of the arbitration process, it is in fact petitioner's approach that would, in the end, lead to additional delay and expense. As a result, her position is contrary to the policy concerns animating the FAA and this Court's arbitration jurisprudence.

a. Petitioner's artificial presumption that all non-"subject matter" limitations on disputes are for arbitrators to apply is flatly inconsistent with the FAA's focus on effectuating the parties' intent. Parties can rationally decide to limit the claims or issues they wish to arbitrate in any number of ways. These limits can include the "subject matter" of the dispute (whatever that may mean), but as now-Chief Judge Becker explained, they can also include other types of restrictions:

> It is ... not hard to conceive of agreements containing economic limitations (*e.g.*, only disputes involving less than $10,000) or geographic limitations (*e.g.*, only disputes arising in Pennsylvania) on the parties' obligation to arbitrate. Similarly, as numerous courts have recognized, parties to an arbitration agreement might substantively limit their obligation to arbitrate in a *temporal* sense.

Cir. 1990) (Easterbrook, J.) (discussing the differences between statutes of limitations and repose in securities litigation).

Hartmann, 921 F.2d at 511 (emphasis in original). Parties can also decide that courts should determine certain issues, such as whether punitive damages are available or whether a party waived the right to arbitrate. *See Mastrobuono*, 514 U.S. at 57-58 (determining the availability of punitive damages); *Drake Bakeries, Inc. v. Local 50, Am. Bakery & Confectionary Workers Int'l, AFL-CIO*, 370 U.S. 254, 266-67 (1962) (determining whether party waived the right to arbitrate). Whether or not these are characterized as "subject matter" issues, they are contractual limits on agreements to arbitrate that should command judicial respect. They should not be disparaged through the imposition of heightened, non-intent-based presumptions. "To rule otherwise ... would thwart the intent of the parties' arbitration agreement." *Ohio Co. v. Nemecek*, 98 F.3d 234, 237 (6th Cir. 1996).

Departing from the parties' expressed intent in favor of artificial presumptions untethered to intent would disserve all parties to all arbitration agreements by depriving them of their right to contract. As *amici* the Trial Lawyers for Public Justice and AARP point out, any "unmooring [of] arbitration from its statutorily mandated basis in a valid contractual agreement" would be especially harmful to consumers. TLPJ & AARP Br. 4. Consumers are the least likely to know the intricacies of arbitration law, and therefore the most likely to rely on the plain language of their agreements. *Cf.* 63 Fed. Reg. at 592 ("plain English rules are particularly important" for "*pro se* parties"). Thus, if courts erect presumptions based on purported policy concerns instead of the parties' intent, it will be increasingly difficult for consumers to discern the import of what they are signing, and increasingly unlikely that arbitration will be consensual.

In many cases, including this Court's decision in *First Options*, it has been individuals or their protectors, not

businesses, that have resisted arbitration. *See, e.g., EEOC v. Waffle House*, 122 S. Ct. 754, 758 (2002) (EEOC); *First Options*, 514 U.S. at 940-41 (investors); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 268-69 (1995) (homeowners). That is presumably the reason why *no* plaintiff groups support petitioner's effort to curtail judicial enforcement of contractual limits on arbitration agreements. Judicial oversight protects *everyone*.

b. While petitioner and the SEC claim that judicial enforcement would thwart the policies behind the FAA by slowing down the dispute resolution process, that contention is both irrelevant and incorrect. It is irrelevant because this Court has repeatedly held that "federal law *requires* piecemeal resolution when necessary to give effect to an arbitration agreement." *Moses H. Cone*, 460 U.S. at 20 (emphasis in original); *accord First Options*, 514 U.S. at 946-47; *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219-21 (1985). As the Court explained in *First Options*, "the basic objective in this area is not to resolve disputes in the quickest manner possible, no matter what the parties' wishes, but to ensure that commercial arbitration agreements, like other contracts, are enforced according to their terms." 514 U.S. at 947 (internal citations and quotations omitted). Thus, even petitioner has to concede that "the primary goal of the FAA was to enforce private agreements to arbitrate and ... *this goal takes precedence over the secondary goal of encouraging efficient and speedy dispute resolution.*" Pet. Br. 12 (discussing *Byrd*) (emphasis added).

Moreover, the most likely source of delay in this context is arbitral, not judicial, resolution of the six-year time bar. Judicial resolution of this dispute should be straightforward because Section 10304 provides a bright-line rule whose application requires only a measuring tape. *See, e.g., Prudential Secs., Inc. v. Yingling*, 226 F.3d 668, 672 n.4 (6th Cir. 2000); *Edward D. Jones & Co. v. Sorrells*, 957 F.2d 509, 513 (7th Cir. 1992). The SEC attempts to complicate

this issue by insisting that "[t]o the extent petitioner claims that respondent made misrepresentations within six years prior to the date that she requested arbitration and that those misrepresentations caused her to retain the investments, then that claim would be timely." SEC Br. 21. The short answer is that petitioner's claim is based solely on the recommendation and sale of investments to her in 1986.[6]

More fundamentally, application of Section 10304 requires only that a district court read a plaintiff's statement of claim, identify the transactions and occurrences that underlie that claim (whether meritorious or not), and determine whether those transactions or occurrences took place more than six years before the plaintiff filed the claim. That is the holding of the very cases cited by the SEC and petitioner on this point. *See* SEC Br. 21 (citing *Cohen*, 62 F.3d at 385; *Hoffman*, 984 F.2d at 1381); Pet. Br. 24-25. Reviewing a statement of claim in this manner is not a time-consuming or expensive proposition; it certainly does not require a "mini-trial," as the SEC and petitioner would have it. SEC Br. 21; *see also* Pet. Br. 24.

c. In contrast to the minimal delay occasioned by judicial enforcement of Section 10304, extensive delay and wasteful proceedings frequently flow from arbitral resolution of eligibility issues. As the NASD has explained, arbitrators "tend to delay eligibility decisions until the hearing on the merits," and thereby subject the parties to unnecessary delay and cost by failing to provide the threshold determination that courts provide. *See* 63 Fed. Reg. at 589; *cf.* Charles N. Brower & Abby C. Smutny, *Arbitration Agreements Versus Forum Selection Clauses: Legal and Practical Considerations*, in INTERNATIONAL DISPUTE RESOLUTION: THE REGULATION OF FORUM SELECTION 37, 42 (Jack

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[6] Petitioner pleaded subsequent misrepresentations only in the context of alleging that statutes of limitations should be tolled—a point irrelevant to Section 10304's bright-line six-year rule. *See* J.A. 21.

Goldsmith ed., 1997) ("the amicable and flexible nature of arbitration may give rise to even greater time delays and consequent costs than litigation"). This tendency is exacerbated by the fact that NASD arbitrators are paid by the half-day, and therefore have a financial incentive to hear cases on their merits instead of, if warranted, dismissing them at the outset on jurisdictional grounds. *See* NASD Code §§ IM-10104, 10205(b).

The SEC only confirms the efficiency of threshold judicial resolution by stressing that courts could review arbitrators' rulings under Section 10304 *after* arbitration has concluded. *See* SEC Br. 10 n.4, 22; *see also Geneva Secs., Inc. v. Johnson*, 138 F.3d 688 (7th Cir. 1998) (invalidating arbitral award under Section 10304); *Edward D. Jones & Co. v. Sorrells*, 957 F.2d 509 (7th Cir. 1992) (same). It defies common sense to subject parties to the time and expense of full arbitration proceedings, and only then to determine whether those proceedings were valid.

d. Petitioner nonetheless suggests that this Court should deny judicial enforcement of Section 10304 in order to avoid opening the floodgates to judicial involvement in all sorts of minor procedural disputes. *See* Pet. Br. 27. This is misguided. There is no reason to believe that parties would agree to judicial involvement in genuinely minor matters, since such involvement would deprive the parties of some of the benefits of arbitration (expedition and reduced cost). The parties thus have an incentive to provide for judicial involvement only when such involvement makes sense.

e. Ironically, it is petitioner's artificial "subject matter"/procedure distinction, and non-intent-based presumption, that would impose the greater burden on the courts by depriving them of clear rules to guide their decisions. The best and most practical way to reduce the burden on the judiciary, and the cost and delay to the parties, is to articulate clear rules that can produce predictable

results. In this context, that means reading arbitration agreements at face value. Doing so simplifies arbitrability determinations to the greatest extent possible, and thereby leads to quicker determinations and fewer conflicts in the lower courts. As this Court explained in *Allied-Bruce Terminix Cos. v. Dobson*, the creation of a "new, unfamiliar test" in this area would "unnecessarily complicat[e] the law, and breed[] litigation from a statute that seeks to avoid it." 513 U.S. 265, 275 (1995).

That is exactly what petitioner is seeking. Petitioner is proposing a presumption, not grounded in this Court's precedents, that all limitations on the "timeliness" of a particular dispute, no matter what their purpose or effect, are for arbitrators to decide. Pet. Br. 28. This proposed presumption would only breed litigation by raising more questions than it answers, since the lower courts would inevitably struggle to determine when and how the facts of a particular case suffice to overcome this presumption. The general *Moses H. Cone* presumption in favor of arbitrability is easy to administer because it looks to whether the parties expressed their intent unambiguously—a familiar standard that courts administer in other contexts involving contract and statutory interpretation. But because petitioner's alternative presumption disregards the wording and import of the particular timeliness restriction at issue, it is unmoored from the best evidence of the parties' intent, and therefore more difficult to apply.

C. The parties did not clearly and unmistakably agree to arbitrate arbitrability.

Notwithstanding the importance of judicial enforcement of Section 10304, petitioner and the SEC argue that the parties agreed to let arbitrators determine their own jurisdiction under that section. Not so. There is a strong presumption that parties do not agree to arbitrate arbitrability precisely because it is unlikely that anyone would do so. *See*

pages 10-12, above. As explained above, this presumption promotes arbitration by making parties more willing to enter into arbitration agreements in the first place. *See id.* Accordingly, this Court has stressed that "silence or ambiguity" on the question who should determine arbitrability is insufficient to deprive parties of judicial protection. *First Options*, 514 U.S. at 944. Only "'clea[r] and unmistakabl[e]' evidence" of an intent to arbitrate arbitrability will overcome the presumption that courts must resolve such issues. *Id.* (quoting *AT&T*, 475 U.S. at 649).[7]

Six of the eight courts of appeals to address this point have concluded that similarly situated parties did not clearly and unmistakably agree to arbitral resolution of eligibility issues. *See, e.g.*, Pet. App. 24a-25a (not clear and unmistakable); *Miller v. Flume*, 139 F.3d 1130, 1134 (7th Cir. 1998) (same); *Smith Barney, Inc. v. Sarver*, 108 F.3d 92, 96-97 (6th Cir. 1997) (same); *PaineWebber Inc. v. Elahi*, 87 F.3d 589, 595 (1st Cir. 1996) (same); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cohen*, 62 F.3d 381, 384 (11th Cir. 1995) (same); *PaineWebber Inc. v. Hoffman*, 984 F.2d 1372, 1379 n.4 (3d Cir. 1993) (same); *PaineWebber Inc. v. Bybyk*, 81 F.3d 1193, 1202 (2d Cir. 1996) (clear and unmistakable); *FSC Sec. Corp. v. Freel*, 14 F.3d 1310, 1312-13 (8th Cir. 1994) (same).

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[7] This presumption serves not only to effectuate the parties' presumed intent, but also to protect their due process right to an impartial decision-maker. Because NASD arbitrators are paid by the half-day, they have a financial incentive to find in favor of their own jurisdiction. *See* NASD Code §§ IM-10104, 10205(b). Requiring parties, against their will, to submit arbitrability disputes to a self-interested decision-maker would violate the Due Process Clause. *See, e.g., Gibson v. Berryhill*, 411 U.S. 564, 578-79 (1973); *Tumey v. Ohio*, 273 U.S. 510, 523 (1927). Thus, before requiring parties to submit issues of arbitrability to arbitrators, it is especially important to confirm that the parties clearly and voluntarily agreed to submit such issues to arbitral resolution.

Petitioner wants to believe that all six of these courts of appeals were mistaken about some "unmistakable" evidence of intent. They were not. The parties here expressed an intent *not* to arbitrate arbitrability by adopting provisions of the NASD Code that contemplate judicial resolution of eligibility issues. None of the language cited by petitioner or the SEC is to the contrary. Petitioner cannot escape this conclusion by resort to state law.

1. The parties agreed that courts would apply Section 10304.

The NASD Code confirms that eligibility issues should be decided by courts, not arbitrators. Section 10304 specifies that petitioner's entire "dispute, claim, or controversy"—not only her "claim"—is ineligible for submission to arbitration. J.A. 48. By precluding arbitral resolution of the overall "dispute," Section 10304 precludes arbitrators from deciding *any* issues in this case, including the threshold question whether this case is arbitrable. A narrower interpretation of Section 10304 would read the terms "dispute" and "controversy" right out of the section.

This point is confirmed by additional provisions of the Code. Section 10104 states that the NASD Director of Arbitration "shall compose and appoint panels of arbitrators ... to conduct the arbitration of any matter which shall be eligible for submission under this Code." NASD Code § 10104. By providing that arbitrators should be appointed for matters that are "eligible for submission," this section contemplates that eligibility is determined *before* arbitrators are appointed, not by the arbitrators themselves. Otherwise, arbitrators would be appointed whether or not a dispute is "eligible for submission," in contravention of Section 10104. When the NASD wished to make a limited exception to this rule, it did so expressly. *See* NASD Code § 10301 (granting arbitrators authority to determine whether certain class action-type claims are eligible for submission); *cf.* NASD

Code § 10402 (granting the Director "sole authority" to determine whether matters are eligible for submission to *mediation*). Here, it did not.

2. NASD Code Section 10324 does not clearly and unmistakably evidence an intent to arbitrate arbitrability.

Petitioner and the SEC ignore these portions of the NASD Code and instead rely on a separate provision, Section 10324, which states that "[t]he arbitrators shall be empowered to interpret and determine the applicability of all provisions under this Code and to take appropriate action to obtain compliance with any ruling by the arbitrator(s)." *See* Pet. Br. 33-35; SEC Br. 28-29. This section states only that arbitrators *may* interpret all provisions of the NASD Code when called upon to do so; not that they have *exclusive* authority to do so in lieu of judicial enforcement of Section 10304.[8] Thus, Section 10324 says "nothing specific about whether the arbitrator or the court should decide whether a claim is arbitrable," and instead leaves that decision to the parties. *Cogswell v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 78 F.3d 474, 480 (10th Cir. 1996) (emphasis added). If the parties clearly and unmistakably agree to let arbitrators apply the eligibility bar of Section 10304, arbitrators can do so under Section 10324. But absent such an agreement, questions arising under the time bar of Section 10304, like all arbitrability questions, are resolved by courts.

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[8] Arbitrators could not possibly have exclusive jurisdiction to apply all sections of the NASD Code, inasmuch as many of those sections, like Section 10304, indicate that they are to be applied or enforced at least in part by someone other than an arbitration panel. *See, e.g.*, NASD Code § 10103 (appointment of Director of Arbitration); § 10104 (appointment of arbitration panels); § IM-10404 (arbitrators' honoraria); § 10202 (composition of arbitration panels); § 10211 (minimum qualifications for arbitrators); § 10312 (disclosures required of arbitrators).

The last sentence of Section 10304 confirms this point by providing that Section 10304's time bar does not "apply to any case which is directed to arbitration by a court of competent jurisdiction." J.A. 48. This provision reflects the NASD's intent that courts will generally apply the time bar, and arbitrators will not second-guess the courts by applying it again. Thus, when read together, Sections 10304 and 10324 contemplate that courts will enforce Section 10304 unless the parties have clearly and unmistakably agreed otherwise. The NASD itself has interpreted the current version of its rules in this manner. *See* 59 Fed. Reg. at 39,374 ("*[u]nless the parties agreed otherwise*, the courts determine the scope of the agreement to arbitrate, including whether a matter is eligible for arbitration on subject matter, timeliness, or other grounds") (emphasis in original).

As the Tenth Circuit recognized, a broader reading of Section 10324 would violate "the generally applicable rules governing contract interpretation that specific provisions [like Section 10304] take precedence over more general provisions [like Section 10324]." *Cogswell*, 78 F.3d at 480; *see generally* RESTATEMENT (SECOND) CONTRACTS § 203 cmt. e (1979); *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 228-29 (1957). At an absolute minimum, the general and permissive language of Section 10324 does not "clearly and unmistakably" require a contrary conclusion. *See Humphrey v. Moore*, 375 U.S. 335, 345 n.8 (1964) (determining that it was "by no means clear" that a general grant of authority to interpret a contract permitted a joint conference committee to interpret specific limitations on its own authority under that contract).

All but two courts of appeals have agreed with the Tenth Circuit on this point. *See, e.g., Miller*, 139 F.3d at 1134; *Cohen*, 62 F.3d at 384; *Sarver*, 108 F.3d at 96. The two courts that held to the contrary rested their holdings on the observation that "[i]n no uncertain terms, [Section 10324] commits interpretation of *all* provisions of the NASD Code

to the arbitrators." *FSC Sec. Corp. v. Freel*, 14 F.3d 1310, 1313 (8th Cir. 1994) (emphasis added); *see also PaineWebber Inc. v. Bybyk*, 81 F.3d 1193, 1202 (2d Cir. 1996) (following *Freel*). In addition to missing the point that Section 10324 is merely permissive and does not confer *exclusive* powers on arbitrators, these courts erred by focusing on Section 10324's *breadth* rather than its lack of *specificity*. As explained above, Section 10324 says nothing specific on the question who should determine eligibility for arbitration.

This latter point is critical because the "clear and unmistakable" test was designed to protect parties that had "not focus[ed] ... upon the significance of having arbitrators decide the scope of their own powers." *First Options*, 514 U.S. at 945. Given that "broad but nonspecific language" does not demonstrate that the parties actually focused on a specific question, it is not "clear and unmistakable." *Brown v. ABF Freight Sys., Inc.*, 183 F.3d 319, 322 (4th Cir. 1999) (Luttig, J.) (applying a similar "clear and unmistakable" rule to an arbitration agreement) (internal quotation and citation omitted); *cf. Gonzaga Univ. v. Doe*, 122 S. Ct. 2268, 2280 (2002) (Breyer, J., concurring) ("broad and nonspecific" language creates uncertainty, not clarity). For precisely this reason, this Court has repeatedly held that broad words like "any" and "all" do not express a clear and unmistakable intent sufficient to overcome similar plain statement rules. *See, e.g., Raygor v. Regents of Univ. of Minn.*, 122 S. Ct. 999, 1004-06 (2002) (citing *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989)); *Blatchford v. Native Village of Noatak & Circle Village*, 501 U.S. 775, 786 & n.4 (1991); *cf. Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 357-58 (1956) (agreement to "refrain from engaging in any strike" did not support "all-inclusive interpretation"). So, too, here, Section 10324's use of the broad term "all" cannot make up for its lack of specificity regarding the question at hand,

especially when read in conjunction with Section 10304, which contemplates *judicial* resolution of eligibility issues.

3. The parties' 1992 agreement does not clearly and unmistakably evidence an intent to arbitrate arbitrability.

Besides relying on Section 10324, petitioner claims that the parties' 1992 agreement clearly and unmistakably commits the parties to arbitrate all arbitrability issues. Even the SEC does not go so far. Instead, the SEC argues that the 1992 agreement could be read to support arbitral resolution of arbitrability issues *if* this Court ignored the *AT&T/First Options* presumption, and instead applied the exact opposite presumption that "parties to a valid arbitration agreement intend the arbitrators to decide disputed issues." SEC Br. 27. Because the SEC is applying the wrong presumption, its analysis of the 1992 agreement is irrelevant. If anything, it shows that the agreement does not "clearly and unmistakably" require the parties to arbitrate arbitrability.

For her part, petitioner argues that because the parties' arbitration agreement generally provides for arbitration of "all controversies" on specified subjects, it manifests a clear and unmistakable intent to arbitrate arbitrability. *See* Pet. Br. 30, 39 (citing J.A. 6-7). Petitioner is mistaken. This clause states only that certain types of controversies should be arbitrated; it does not specify who should determine whether this is one of those types of controversies. In other words, the parties' arbitration clause identifies the *scope* of their arbitration obligations, but does not specify who should decide which cases fall within that scope, *i.e.*, which cases are arbitrable. That task falls to the courts. *Cf. AT&T*, 475 U.S. at 644-45 (holding that arbitration clause providing that "differences arising with respect to the interpretation of this contract ... must be referred to a mutually agreeable arbitrator" was not clear and unmistakable) (internal quotation omitted).

Petitioner attempts to overcome this by stating that "[t]he word 'all'" is "as *broad*[] as possible." Pet. Br. at 39 (emphasis added). But once again, this misses the mark. As explained above, "broad but nonspecific" words like "all" cannot overcome the plain statement rule because they show only that the parties used broad words; not that they had a specific intent on the specific question whether to submit arbitrability to arbitrators. *See Brown*, 183 F.3d at 322; page 38, above. Petitioner all but admits this by claiming that "inasmuch as agreements to arbitrate are generously construed," "[t]he phrase 'all controversies' *presumably* includes" arbitrability disputes. Pet. Br. 39 (emphasis added; internal quotation omitted). Because, however, the question here is whether the parties expressed a clear and unmistakable intent to consign the specific issue of arbitrability to arbitrators, petitioner's advocacy of generous construction and presumption shows only that the parties did *not* manifest such an intent.

Petitioner also relies briefly on the "Arbitration Disclosures" of the parties' agreement. *See* Pet. Br. 40. Those disclosures explain to the customer that "[a]rbitration is final and binding on the parties," "[t]he parties are waiving their right to seek remedies in court, including the right to jury trial," and "[p]re-arbitration discovery is generally more limited than and different from court proceedings." J.A. 6. Far from addressing the question at hand, these disclosures only describe the broad confines of what arbitration entails to the layperson. While petitioner seizes on the statement that "the parties [are] waiv[ing] their right to seek remedies in court, including the right to jury trial," the Tenth Circuit correctly concluded that nothing in that sentence specifically addresses the question who decides whether a specific dispute is arbitrable. *See* Pet. App. 27 (internal quotation omitted). Waiver of the right to jury trial in an arbitrable case, on the one hand, and waiver of the right to judicial determination of whether a dispute is arbitrable, on the other

hand, are entirely different matters. Moreover, a broad reading of the provision "would essentially nullify Howsam's arbitration rights entirely" because it would "mean that Howsam had waived any ability to seek an order compelling arbitration, or to seek judicial enforcement of an arbitration award." *Id.* at 27-28 (internal quotation omitted). That is an unreasonable construction of the contract, not a "clear and unmistakable" one.

Accordingly, petitioner is in the curious position of arguing that the agreement is "clear and unmistakable" based on the canon of construction that "'a court should construe *ambiguous* language against the interest of the party who drafted it.'" Pet. Br. 36 (quoting *Mastrobuono*, 514 U.S. at 62) (emphasis added). Of course, this canon is inapplicable in this context. It applies only when an agreement is ambiguous, but if the parties' agreement is ambiguous on the question who decides arbitrability, *AT&T Technologies* and *First Options* require that it be construed in favor of judicial resolution.[9]

Petitioner's reliance on *Mastrobuono* is likewise misplaced, because the question there was whether certain claims were arbitrable, *not* who should decide arbitrability issues. As a result, the *AT&T/First Options* presumption did not apply in *Mastrobuono*. Because the presumption does apply in the present case, it trumps any and all contrary common-law canons of construction. *See First Options*, 514 U.S. at 944 (explaining that the "clear and unmistakable"

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[9] Petitioner's canon is inapplicable even on its own terms because Dean Witter is not the drafter of the relevant provisions. As the SEC acknowledges, Dean Witter is required by federal law to be a member of the NASD; is required by the NASD to agree to arbitration under the NASD Code (which is drafted by the NASD and approved by the SEC); and is required by the NASD not to modify the core language of its customer service agreement. *See* SEC Br. 9 n.3. Accordingly, petitioner errs in arguing that Dean Witter should be held responsible for deliberately drafting a vague agreement. *See* Pet. Br. 35-36.

presumption is an "important qualification" to the general rule that courts "apply ordinary state-law principles that govern the formation of contracts"). Even when plain-statement rules are not at issue, the canon construing ambiguous language against the drafter is "used only as a matter of last resort after all [other] aids to construction have been employed." *United States Fire Ins. Co. v. General Reinsurance Corp.*, 949 F.2d 569, 573 (2d Cir. 1991); *accord Mesa Air Group, Inc. v. Department of Transp.*, 87 F.3d 498, 506 (D.C. Cir. 1996). Petitioner's reliance on this inapplicable canon of last resort serves only to confirm that the 1992 agreement does not clearly and unmistakably support her position.

4. Petitioner's reliance on New York law is misplaced.

In a final effort to rebut the *AT&T/First Options* presumption, petitioner (but not the SEC) argues that this case is governed by New York rather than federal arbitration law. *See* Pet. Br. 40-43. This is incorrect. It is also irrelevant, because the New York case cited by petitioner purports to apply federal, not state, law.

As the Tenth Circuit held, this case is governed by the "'federal substantive law of arbitrability'" that the federal courts have derived under the FAA. Pet. App. 20a (quoting *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)); *see also Perry v. Thomas*, 482 U.S. 483, 489-91 (1987). While petitioner is correct that federal arbitrability law generally borrows state-law contract interpretation principles as part of its analysis, *see* Pet. Br. 42, "the law which ultimately results is federal." *Wiley & Sons*, 376 U.S. at 548; *cf. Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 457 (1957).

Nonetheless, petitioner claims that by including a generic choice-of-law clause in their agreement, the parties "expressly agreed that New York law would govern the

interpretation and enforcement of their dispute." Pet. Br. 38, 42. That clause, however, expresses only the parties' choice of one state's laws over another's; it does not express a preference between federal and state law. *See Roadway Package Sys., Inc. v. Kayser*, 257 F.3d 287, 293 (3d Cir. 2001) (Becker, J.), *cert. denied*, 122 S. Ct. 545 (2001); *Sovak v. Chugai Pharm. Co.*, 280 F.3d 1266, 1270 (9th Cir. 2002) (O'Scannlain, J.), *petition for cert. filed*, 71 U.S.L.W. 3002 (June 18, 2002) (01-1860); *Volt*, 489 U.S. at 489-90 (Brennan, J., dissenting). Otherwise, *every* federal law, including the FAA, would be inapplicable to *every* contractual relationship that included a choice-of-law provision.

Petitioner's contrary reliance on *Volt* is misleading because the Court in *Volt* deferred to the California state courts' interpretation of a contract. *See Volt*, 489 U.S. at 474; *id.* at 481 (Brennan, J., dissenting). When this Court later considered *de novo* the import of a New York choice-of-law clause in an arbitration agreement, the Court distinguished *Volt* on this very ground. *See Mastrobuono*, 514 U.S. at 60 n.4. The Court then held that the choice-of-law clause made New York law applicable to the substantive "rights and duties of the parties," but not to arbitrability issues. *Id.* at 64. As the Tenth Circuit recognized, it is *Mastrobuono*, not *Volt*, that controls here. *See* Pet. App. 22 (citing cases).

In any event, petitioner has cited *no* New York law favorable to her position, and instead has cited only to a New York case that misapplied *federal* law five years after the parties to this case signed their arbitration agreement. *See* Pet. Br. 42 (citing *Smith Barney Shearson Inc. v. Sacharow*, 689 N.E.2d 884 (N.Y. 1997)). As the Tenth Circuit explained, the *Sacharow* court recognized that federal arbitration law applied notwithstanding the parties' New York choice-of-law clause. *See* Pet. App. 22 n.6; *Sacharow*, 689 N.E.2d at 888-89. In applying federal law, the New

York court correctly held that "the plain language of the NASD eligibility rule presents a question of arbitrability" because it "limits the subject of, entitlement to, and range of arbitrable matters." 689 N.E.2d at 886-87. But the state court then followed the Second and Eighth Circuit cases holding that parties to standard securities arbitration agreements "clearly and unmistakably" manifest an intent to arbitrate arbitrability. *See id.* at 887-88 (citing *Bybyk*, 81 F.3d at 1196-1202; *Freel*, 14 F.3d at 1312-13). As the Tenth Circuit explained, the New York court, like the Second and Eighth Circuits, erred as a matter of federal law by giving "insubstantial weight to the presumption established in *First Options*." Pet. App. 24a n.7.

In sum, the New York court simply followed the minority (and erroneous) lower-court approach to a question of federal law. Just as this Court is "in no way bound by state courts' answers to similar questions involving state law," *United States v. Craft*, 122 S. Ct. 1414, 1426 (2002), it is manifestly not bound by a state court's misapplication of federal law.

II. THE COURT SHOULD DISMISS THE PETITION AS IMPROVIDENTLY GRANTED.

The Tenth Circuit's decision is correct under the settled principles of law discussed above. Instead of affirming, however, this Court should dismiss the petition as improvidently granted. After this Court granted *certiorari*, the NASD and the SEC took action to amend Sections 10304 and 10324. *See* 67 Fed. Reg. 19,464 (Apr. 19, 2002). As a result, a decision by this Court in this case would have little practical significance.

The new rule embodies a compromise. As the SEC explains, the new rule provides that Section 10304 will be enforced by neither courts nor arbitrators. *See* SEC Br. 4 n.2. Instead, the rule will be independently enforced by the NASD Director of Arbitration, who will appoint an

arbitration panel to hear a dispute *only if* he or she first determines that the claim is eligible for submission. *See* 67 Fed. Reg. at 19,464-65. Signally, this compromise ensures that the decision is entrusted to an impartial individual at the threshold, rather than to a self-interested arbitration panel as part of its overall consideration of the case. It thereby confirms that the rule is intended to impose an efficient bar on arbitrators' jurisdiction, not merely a statute of limitations defense. Accordingly, the amendment buttresses Dean Witter's position that the current version of the rule should be independently enforced by courts, not arbitrators, unless the parties clearly and unmistakably agreed otherwise.

With the SEC poised to approve the amendment, however, a decision by this Court in this case would have little practical significance. Past proposals to amend Section 10304 languished because they were part of a broader package of amendments that included more controversial issues, including the availability of punitive damages. *See* 67 Fed. Reg. at 19,465-66 & n.8. After this Court granted *certiorari* in this case, however, the NASD severed the proposed amendment to Sections 10304 and 10324 from the other proposals and asked the SEC to approve that amendment alone. *See id.* at 19,466. The public comment period on the amendment has now ended, *see* SEC Br. 4 n.2, and the SEC is expected to approve it.

Given this anticipated amendment, a decision by this Court construing the current versions of Sections 10304 and 10324 would apply to only a handful of pending cases. The SEC suggests that this Court's decision would still have "some continuing significance," because the proposed rules "would apply only to arbitrations before the NASD, and would not change rules similar to the current NASD Rule 10304 that are in effect at other" self-regulatory organizations ("SROs"). SEC Br. 4 n.2. But as the SEC acknowledges, "the NASD conducts about 90% of SRO arbitrations." *Id.* Moreover, the reason that all SROs

currently have uniform rules is that the SEC strongly encourages uniformity. *See* Pet. Br. 14. Once the SEC approves the amended NASD rule, the other organizations will likely follow suit.

As a result, this case no longer warrants this Court's attention. As explained above, affirmance of the Tenth Circuit requires only the application of settled legal principles to a specific rule that will likely change in the near future. On the other hand, reversal would unsettle this Court's jurisprudence by departing from the parties' expressed intent in favor of an indeterminate analysis that would jeopardize the rights of all parties to arbitration agreements while confusing, not settling, this area of law. While such a course is never warranted, it is emphatically unwarranted on the fleeting facts of this case.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the court of appeals or dismiss the petition as improvidently granted.

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In The
Supreme Court of the United States

KAREN HOWSAM, individually and as Trustee for the E. Richard Howsam, Jr. Irrevocable Life Insurance Trust dated May 14, 1982,

Petitioner,

v.

DEAN WITTER REYNOLDS, INC., a Delaware corporation,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

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ARGUMENT IN REPLY

I. RULE 10304 MUST BE APPLIED BY ARBITRATORS

A. DWR'S ARGUMENT FOR COURT DETERMINATION OF "ALL RESTRICTIONS ON THE SCOPE OF ARBITRATION" IS UNSUPPORTED BY PRECEDENT

DWR contends that the presumption that courts will decide issues of arbitrability applies to "[a]ll restrictions on the scope of arbitration." Resp. Br. 13. However, DWR has not identified any case which applies that presumption to any question other than (1) whether the parties are bound by a valid arbitration agreement and (2) whether the subject matter of the dispute falls within the agreement.

In *First Options of Chicago v. Kaplan*, 514 U.S. 938 (1995), the parties had not signed an agreement to arbitrate anything, let alone arbitrability. Unlike *First Options*, the parties in this case did sign an arbitration agreement. This case therefore raises questions answered by *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983), in which the parties agreed to arbitrate, but disagreed over which merits-related disputes were covered. In such a case, the courts apply a strong presumption in favor of arbitration:

> The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an

> allegation of waiver, delay, or a like defense to arbitrability.[1]

Guidance is also found in *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 558-559 (1964), in which the Court said "[r]efusal to order arbitration of subjects which the parties have not agreed to arbitrate does not entail the fractionating of disputes about subjects which the parties do wish to have submitted."

DWR mistakenly contends that Howsam and the SEC argue for a *per se* rule that time limits can never be enforced by courts (Resp. Br. 15, 18) or that Howsam is trying "to manufacture some *heightened* presumption with respect to timeliness" (Resp. Br. 19). To the contrary, Howsam and the SEC simply argue that the ordinary presumption in favor of having arbitrators decide issues in the first instance applies to time limits, in the absence of express language stating otherwise. *See* SEC Br. 11-12, 16, 17 n.5, 19.

DWR further errs in arguing that Howsam's and the SEC's "position is not based on the parties' expressed intent." Resp. Br. 15. DWR is unable to point to anything that comes remotely close to an agreement by the parties that timeliness issues should be decided by a court rather than arbitrators. Indeed, it is DWR which advocates "[d]eparting from the parties' expressed intent in favor of artificial presumptions untethered to intent" (Resp. Br. 29) by trying to avoid the ordinary understanding of the clause mandating arbitration of "all controversies" between the parties.

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[1] *Moses H. Cone*, 460 U.S. at 24-25. *See also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 626 (1985); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-583 (1960).

DWR argues that the concept of "subject matter" arbitrability is inherently indeterminate. But its position that "all restrictions on the scope of arbitration" are arbitrability issues for court determination is far more difficult to administer. Presumably, such restrictions could entail payment of arbitration filing fees, timely submission of briefs, or compliance with other procedural requirements, all of which are within the province of arbitrators to decide.

DWR invokes *General Drivers, Warehousemen & Helpers, Local Union 89 v. Moog Louisville Warehouse*, 852 F.2d 871, 874 (6th Cir. 1988), in support of its position that "subject matter" can include a time limitation. In stating that "[a]t least one circuit has construed the 'subject matter' of a dispute in precisely that way" (Resp. Br. 16), DWR totally ignores the fact that other panels of the Sixth Circuit have disapproved the holding in *Moog*; *e.g., Raceway Park v. Local 47, SEIU*, 167 F.3d 953 (6th Cir. 1999); *Armco Employees Indep. Fed'n v. AK Steel Corp.*, 252 F.3d 854 (6th Cir. 2001).

In the first paragraph of *Raceway Park*, the court described *Moog* as "a decision with which we disagree" but were forced to follow "despite strong misgivings." 167 F.3d at 954. The court further stated that *Moog* "represents a grave departure from Supreme Court doctrine mandating that issues of procedural arbitrability be determined by arbitrators, not judges," *citing John Wiley,* 167 F.3d at 954. In a section entitled ***"Moog's* MISFORTUNE,"** the court wrote,

> We find that there is no rational basis on which to distinguish between those issues which the Supreme Court in *John Wiley & Sons* deemed to be procedural, and thus reserved for the

> arbitrator, and the issue considered by this Court in both *Moog* and the present matter.

Id. at 962.

In *Armco*, a later Sixth Circuit panel flatly refused to apply *Moog*, choosing instead to follow *John Wiley*, holding that the question of timeliness must be submitted to the arbitrator. 252 F.3d at 861.

B. THE PARTIES' INTENT TO ARBITRATE MATTERS WITHIN THE SCOPE OF THE AGREEMENT IS PRESUMED

DWR appears to contend that whether a particular issue is a question of "arbitrability" turns on the parties' intent. Resp. Br. 18, 19, 26. While this Court has held that the parties' intent controls who decides whether claims are arbitrable, where the parties have agreed to arbitrate all controversies, only the most "forceful" evidence of intent to exclude a dispute from arbitration will prevail. *Warrior & Gulf*, 363 U.S. 584-585. It is DWR, not Howsam, who suggests a new unfamiliar test requiring multi-layered inquiries into the parties' intent.

At page 17 of its brief, DWR, discussing *John Wiley*, states that,

> In sum, the Court considered a timeliness issue as an 'arbitrability' issue for judicial resolution pursuant to the parties' expressed intent; it did not use an artificial 'subject matter'/procedure distinction to override that intent, as petitioner and the SEC urge here.

DWR confuses the Court's discussion of whether or not the union's claim arose before expiration of a collective bargaining agreement with discussion of whether the union's claims were procedurally timely. The Court held that the former issue was for the court to decide and left the latter to the arbitrators. In Howsam's case, no one has suggested

that the 1992 Agreement had expired or for any other reason did not cover Howsam's claims.

DWR's attempt to distinguish *Int'l Union of Operating Eng'rs v. Flair Builders, Inc.*, 406 U.S. 487 (1972), is equally unavailing. DWR, with no support from the text of *Flair Builders*, states that the Court,

> assumed that restrictions on the timeliness of disputes can present 'arbitrability' issues for judicial resolution, but determined that the parties in that case had expressed an intent to arbitrate timeliness because (unlike here) they had not incorporated into their agreement a provision excluding untimely disputes from arbitration.

Resp. Br. 17. To the contrary, if any "assumption" by the Court can be gleaned from *Flair Builders*, it is that for issues of timeliness, the usual presumption in favor of submission of issues to arbitrators applies once it is determined that the parties entered into a valid arbitration agreement covering the subject matter of the dispute. Nothing in Rule 10304 supports DWR's position that the parties agreed it was to be applied by courts rather than arbitrators. J.A. 48. As DWR itself states, "[t]he 'clear and unmistakable' presumption applies to whether the parties agreed to submit arbitrability to arbitrators, not to whether an issue is an arbitrability issue in the first place." Resp. Br. 18.

DWR's attempt to minimize the effect of the statement in *Moses H. Cone* that "doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability," is also unconvincing. 460 U.S. at 24-25. DWR argues that the quoted language "only confirms . . . that non-'subject matter' limitations, including timeliness limitations, are *not* governed by a special

standard." Resp. Br. 19. That statement contradicts its position that "all restrictions on the scope of arbitration" are governed by the special *First Options* presumption that parties do not intend to arbitrate arbitrability.

DWR's discussion of *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995), is also off the mark. DWR suggests that this Court's resolution of whether punitive damages were available in arbitration is inconsistent with a "subject matter" limitation on arbitrability issues. Resp. Br. 18. However, as DWR points out in its brief, *Mastrobuono* addressed only whether punitive damages were available, not who should decide whether they were arbitrable. Resp. Br. 41. *Mastrobuono* came to this Court after arbitrators had determined in the first instance that they could award punitive damages. The process was consistent with Howsam's and the SEC's position that DWR can seek judicial review of the arbitrators' application of Rule 10304, but cannot preempt the arbitrators' determination by antecedent court action.

C. ANALYSIS OF TEXT, STRUCTURE, AND PURPOSE SHOWS THAT THE SIX YEAR RULE DOES NOT INVOKE THE ARBITRABILITY QUESTION

1. The Split Among Courts Demonstrates The Inherent Ambiguity of Rule 10304

The split in the circuits arises from two opposing constructions of Rule 10304 and similar rules of other SROs. One holds that the rule is a substantive limitation on the arbitrators' powers and therefore a matter of threshold arbitrability. The other holds that the rule is procedural and therefore within the jurisdiction of the arbitrators. Five federal circuits and at least two state appellate courts have published decisions adopting the securities industry's position that the rule presents an

issue of arbitrability.[2] However, a New York appellate court concluded that a customer agreement requiring arbitration of "any and all controversies" evidenced intent to send questions of arbitrability to the arbitrators. That court buttressed its conclusion by finding that Rule 10324 is a "clear and unmistakable" expression of "the parties' intent and commitment to arbitrate the issue of arbitrability." *Sacharow*, 689 N.E.2d at 888; J.A. 48.

On the other side of the issue, four federal circuits and nine state appellate courts have held that the six year rule is a matter for the arbitrators and not a substantive limitation on arbitrability.[3] In addition, the Eighth Circuit

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[2] *See PaineWebber, Inc. v. Hartmann*, 921 F.2d 507 (3d Cir. 1990); *Roney & Co. v. Kassab*, 981 F.2d 894 (6th Cir. 1992); *PaineWebber, Inc. v Farnam*, 870 F.2d 1286 (7th Cir. 1989); *Cogswell v. Merrill Lynch, Pierce, Fenner & Smith*, 78 F.3d 474 (10th Cir. 1996); *Merrill Lynch, Pierce, Fenner & Smith v. Cohen*, 62 F.3d 381 (11th Cir. 1995); *Todorov v. Alexander*, 600 N.W.2d 418 (Mich. App. 1999); *Smith Barney Shearson Inc. v. Sacharow*, 689 N.E.2d 884 (N.Y. 1997). A third state has an unpublished opinion consistent with this view: *Ohio Co. v. Stambaugh*, 1998 Ohio App. LEXIS 2583 (Ohio App., Clark Co., June 12, 1998).

C. Thomas Mason's comprehensive study of the six year rule provides a history of the rule, analyzes its meaning and application, and examines every publicly available court decision dealing with the six year rule from its inception through May 1997. *Irreducible Disagreements: The Six-Year Eligibility Rule Revisited*, 1 Securities Arbitration 1997, 557-759 (hereafter Mason, *Irreducible Disagreements).* (Mr. Mason provided substantial material for this brief.)

[3] *See Painewebber Inc. v. Elahi*, 87 F.3d 589 (1st Cir. 1996); *PaineWebber Inc. v. Bybyk*, 81 F.3d 1193 (2nd Cir. 1996); *Smith Barney Shearson, Inc. v. Boone*, 47 F.3d 750 (5th Cir. 1995); *O'Neel v. Nat'l Ass'n of Sec. Dealers, Inc.*, 667 F.2d 804 (9th Cir. 1982); *Shahan v. Staley*, 932 P.2d 1345 (Ariz. App. 1996); *Levine v. Advest, Inc.*, 714 A.2d 649 (Conn. 1998); *Bayley v. Fox*, 671 N.E.2d 133 (Ind. App. 1996); *Smith Barney, Inc. v. Keeney*, 570 N.W.2d 75 (Iowa 1997); *Weston Secs. Corp. v. Aykanian*, 703 N.E.2d 1185 (Mass. App. 1998); *Gaines v. Fin. Planning Consultants, Inc.*, 857 S.W.2d 430 (Mo. App. 1993); *Smith Barney, Inc. v. Painters Local Union No. 109 Pension Fund*, 579 N.W.2d 518 (Neb.

(Continued on following page)

held that regardless of whether the rule is substantive or procedural, Rule 10324 "is *a 'clear and unmistakable' expression of [the parties'] intent to leave the question of arbitrability to the arbitrators.*" *FSC Sec. Corp. v. Freel*, 14 F.3d 1310, 1312-1313 (8th Cir. 1994) (emphasis added).

The split among the circuits and state appellate courts demonstrates that Rule 10304 and similar SRO rules are ambiguous. Numerous panels of learned, qualified, and thoughtful judges from five federal circuits, appeals courts in nine states, and many trial courts have disagreed with the language quoted by DWR from *Hartmann*. Resp. Br. 20.

This Court has rejected the argument that language is unambiguous where courts have been so fractionalized in its interpretation. As the Court stated in *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 739 (1996), "[i]n light of the two dissents . . . and . . . the opinion . . . creating the

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1998); *Mid-State Sec. Corp. v. Edwards*, 706 A.2d 773 (N.J. Super. App. Div. 1998); *Smith Barney, Inc. v. Bardolph*, 509 S.E.2d 255 (N.C. App. 1998). *See also Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Havird*, 518 S.E.2d 48 (S.C. App. 1999) (review dismissed at the request of the parties, appellate opinion vacated).

The D.C. Circuit has not examined the issue. The Fourth Circuit has not decided the question in a published opinion; its statements in dicta and unpublished opinions conflict: contrast *Humphrey v. Prudential Sec.*, No. CA-92-178-2, *slip op.* at 10 (E.D. Va. Jan. 6, 1993), *appeal dismissed*, 4 F.3d 313 (4th Cir. 1993), with *PaineWebber Inc. v. Allen*, 888 F. Supp. 53 (E.D. Va. 1993), *aff'd mem.*, 45 F.3d 427 (4th Cir. 1995). Florida state courts appear to be in conflict: compare *Barnett Sec. v. Faerber*, 648 So. 2d 265 (Fla. App. 2d Dist. 1995), with *Corporate Secs. Group v. Lind*, 753 So. 2d 151 (Fla. App. 4th Dist. 2000), *review dismissed*, 789 So. 2d 340 (Fla. 2001). California Courts have spoken only in dicta and also appear to be in conflict: compare *Citibank v. Crowell, Weedon & Co.*, 5 Cal.Rptr.2d 906 (Cal. App. 2d Dist. 1992), with *Kennedy, Cabot & Co. v. Nat'l Ass'n of Sec. Dealers, Inc.*, 49 Cal.Rptr.2d 66 (Cal. App. 2d Dist. 1996).

conflict that has prompted us to take this case, it would be difficult indeed to contend that the word 'interest' . . . is unambiguous with regard to the point at issue here." *See also Wis. Dep't of Health & Family Servs. v. Blumer*, 534 U.S. 473 (2002) (similar, citing *Smiley*).

Because the six year rule is ambiguous, courts should apply the strong presumption in favor of arbitration. "[W]hen a court interprets [ambiguous] provisions in an agreement covered by the FAA, 'due regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself resolved in favor of arbitration.'" *Mastrobuono*, 514 U.S. at 62. "[S]ilence or ambiguity about the question 'whether a particular merits-related dispute is arbitrable because it is within the scope of a valid arbitration agreement'" is construed so as to direct the dispute to arbitration. *First Options*, 514 U.S. at 944-5; also *Moses H. Cone*, 460 U.S. at 24-25.

As the First Circuit stated in *Elahi*, "the signing of a valid agreement to arbitrate the merits of the subject matter in dispute presumptively pushes the parties across the 'arbitrability' threshold; we will then presume that other issues relating to the substance of the dispute or the procedures of arbitration are for the arbitrator." 87 F.3d at 599.

2. Textual and Contextual Analysis Confirms That Rule 10304 Is To Be Applied By Arbitrators

Principles of statutory interpretation can assist in understanding Rule 10304 and its place within the NASD Code.

> [A] reviewing court should not confine itself to examining a particular statutory provision in isolation. The meaning – or ambiguity – of certain

> words or phrases may only become evident when placed in context. It is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.' A court must therefore interpret the statute 'as a symmetrical and coherent regulatory scheme,' and 'fit, if possible, all parts into an harmonious whole.'

FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132-133 (2000) (citations omitted). The Court should therefore look at how Rule 10304 fits into the Code as a whole.

The NASD Code of Arbitration Procedure is organized into four parts:

> Series 1: Administrative Provisions (Rules 10100-10106)
>
> Series 2: Industry and Clearing Controversies (Rules 10200-10216)
>
> Series 3: Uniform Code of Arbitration (Rules 10300-10336)
>
> Series 4: Mediation Rules (Rules 10400-10406)

Rule 10101 is entitled "Matters Eligible for Submission." It adopts the Code for arbitration of "any dispute, claim, or controversy arising out of or in connection with the business of any member of the Association . . . (c) between or among members or associated persons and public customers, or others." J.A. 47.

Rules 10301-10336 are rules of arbitration *procedure* for the parties and arbitrators to follow. They deal with pleadings, selection of arbitrators, composition of panels, discovery, hearing procedures, awards, fees, and other related topics. Rule 10301 states, "[a]ny dispute, claim, or controversy *eligible for submission under the Rule 10100*

Series between a customer and a member and/or associated person arising in connection with the business of such member or in connection with the activities of such associated persons shall be arbitrated under this Code . . . " (emphasis added). Rule 10304 is an instruction *to the arbitrators* regarding timeliness. The placement of Rule 10304 in Series 3 of the Code rather than Series 1, supports Howsam's and the SEC's position that it is meant to be a procedural matter for the arbitrators to decide. In that same vein, Rule 10305, entitled "Dismissal of Proceedings," authorizes the arbitrators to dismiss proceedings under certain circumstances.

Rule 10324 expressly empowers the arbitrators "to interpret and determine the applicability of all provisions under this Code and to take appropriate action to obtain compliance with any ruling by the arbitrator(s)." J.A. 48. This power clearly includes interpreting and applying Rules 10301, 10304, and 10305. "Nothing in the NASD Code removes [Rule 10304] from the ambit of [Rule 10324]." *Bybyk*, 81 F.3d at 1202.

Rules of construction for statutes and contracts advise against interpretations which would make some provisions surplusage. " '[A] statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.' This rule has been repeated innumerable times." *Market Co. v. Hoffman*, 101 U.S. 112, 115-116 (1879). Rule 10301(a), which repeats language in Rule 10101 and refers expressly to it, would be redundant without recognition that the 10300 series provides procedural instructions to arbitrators and parties.

Examining and analyzing the phrases relating to "eligibility" for "submission" makes more sense against the backdrop of the division of the Code into its parts. Rule 10301(d) provides that class actions and claims by

class members are not eligible for arbitration except where a class member has opted out of the class. Rule 10301 does not alter Rule 10101's definition of arbitrability. Rather, it provides procedural rules. Similarly, Rule 10301(a)(1)-(3) provides that claims involving terminated, expelled, or defunct members are ineligible for submission unless the customer agrees in writing to arbitrate. Again, the rule is one of procedure rather than arbitrability, even though words of eligibility are used.

DWR's references to Rule 10104, which provides for appointment of arbitrators for "any matter which shall be eligible for submission under this Code," and Rule 10301 help prove the point. Resp. Br. 35. Rule 10104 closely follows Rule 10101, which lists matters eligible for submission. Both are contained in Series 1. DWR concludes, erroneously, that Rule 10104 "contemplates that eligibility [under Rule 10304] is determined *before* arbitrators are appointed, not by the arbitrators themselves." DWR argues that "[w]hen the NASD wished to make a limited exception to this rule, it did so expressly" in Rule 10301, which grants "arbitrators authority to determine whether certain class action-type claims are eligible for submission." By placing the six year rule in Series 3, along with Rule 10301, the NASD also placed authority to determine eligibility under the six year rule with the arbitrators. By doing so, it demonstrated its intent that the time limitation did not implicate "arbitrability" and would be subject to interpretation and application by the arbitrators under Rule 10324. Otherwise, why not include the six year rule in Rule 10101 or in Series 1?

The fallacy of DWR's position is again demonstrated by its reference to Rule 10336(a) which provides for an amount-in-controversy limitation for claims "eligible to be heard by a single arbitrator." Resp. Br. 21. Rule 10336 "allows" parties with claims of $50,000 to $200,000 to elect a single arbitrator instead of a panel of three. DWR's

argument that "eligible" in that context equates to "arbitrable" reduces itself to an absurdity and demonstrates clearly that "eligible" does not always mean "arbitrable."

Looking at the words "eligible" and "submission" in the dictionary, as the Third Circuit did in *Hartmann* (Resp. Br. 20), without looking to their textual surroundings and practical application, violates the teachings of this Court. In *U.S. v. Amer. Trucking Ass'ns,* 310 U.S. 534, 542 (1940), the Court counseled against taking "a few words from their context and with them thus isolated to attempt to determine their meaning . . . ." Similarly, the Court has said, "it is a 'fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used.'" *Textron Lycoming Reciprocating Engine Div. v. United Auto.*, 523 U.S. 653, 657 (1998), *citing Deal v. U.S.*, 508 U.S. 129, 132 (1993).

The word "submission" has a number of meanings in differing contexts. In ordinary legal parlance, "submission" means tendering a cause to the adjudicator after presentation of evidence and/or legal argument. *See, e.g., Weisgram v. Marley Co.*, 528 U.S. 440, 448 n.4 (2000) ("[m]otions for judgment as a matter of law may be made at any time before submission of the case to the jury"). Appellate cases are taken under "submission" after oral arguments, not when the notices of appeal are filed. The word "submission" in Rule 10304 reasonably refers to "submission for full adjudication of the merits, rather than submission for preliminary determinations, such as whether the claim is time-barred, or whether the appropriate fee was paid, or whether the claim was submitted on the proper forms." *Elahi*, 87 F.3d at 600.

3. Rule 10304 Is A Procedural Timeliness Rule, Not An Arbitrability Rule

DWR argues that Rule 10304's time limitation is not a statute of limitation or repose and was adopted by the NASD and other SROs to avoid arbitration of stale claims. Resp. Br. 22-23. Regardless, it is still a timeliness rule. The fact that it is not coextensive with statutes of limitation says nothing about whether or not it should be considered a question of arbitrability. Because the Rule relates to timeliness in asserting a claim rather than to the character of the underlying claim, and because it requires a detailed understanding of the underlying claim, it should be considered a question presumptively for the arbitrators to decide.

Section 6(c) of the Uniform Arbitration Act (2000), provides that arbitrators "shall decide whether a condition precedent to arbitrability has been fulfilled . . . ." Unif. Arbitration Act (2000) § 6(c), 7 U.L.A. 12 (Supp. 2002). The drafters of the Act "intended to incorporate the holdings of the vast majority of state courts and the law that has developed under the FAA that, . . . issues of procedural arbitrability, *i.e.*, whether prerequisites such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate have been met, are for the arbitrators to decide." *Id.* at 13 cmt. 2.

D. ARBITRATORS ARE CAPABLE OF APPLYING RULE 10304

DWR cites the NASD's statement that "the *securities industry believed* that the inherently equitable nature of arbitration posed a greater risk that arbitrators might not strictly apply legal defenses such as statutes of limitation" as if such belief were authoritative. Resp. Br. 24. That argument is particularly surprising in light of the fact that arbitration is imposed on investors by the securities industry, including DWR, which succeeded in convincing

this Court in *Dean Witter Reynolds v. Byrd*, 470 U.S. 213 (1985), and subsequent cases, to enforce customer arbitration agreements.

The arbitral fora available to investors are SRO's, such as the NASD, which select and train their arbitrators. Nevertheless, DWR repeatedly suggests that arbitrators are not to be trusted to follow the law and fairly to resolve disputes. Resp. Br. 24, 32, 34 n.7. DWR even cynically suggests that arbitrators will not properly apply Rule 10304 because they have a financial incentive to hear cases on their merits rather than dismiss them early on. Resp. Br. 32, 34 n.7. There is no evidence that NASD arbitrators depend for their living on the honoraria they receive. Most are employed full-time in other pursuits or are retired. None gets rich arbitrating.

This Court rejected arguments that arbitrators were unqualified in *Shearson/American Express v. McMahon*, 482 U.S. 220, 232 (1987),

> In *Mitsubishi*, for example, we recognized that arbitral tribunals are readily capable of handling the factual and legal complexities of antitrust claims, notwithstanding the absence of judicial instruction and supervision. Finally, we have indicated that there is no reason to assume at the outset that arbitrators will not follow the law; although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute.

Citations omitted. The Court in *McMahon* held that arbitrators are capable of applying the federal securities laws and the RICO act. After *Byrd*, *McMahon*, and *Rodriquez de Quijas v. Shearson/American Express*, 490 U.S. 477 (1989), the securities industry, and DWR, should be estopped from arguing that arbitrators are not competent to apply Rule 10304.

E. POLICY CONSIDERATIONS CONFIRM THAT RULE 10304 IS FOR THE ARBITRATORS TO APPLY

DWR makes the grandiose statement that, "[b]y denigrating the parties' expressed intent, petitioner would jeopardize the rights of all parties to arbitration agreements, particularly (and ironically) consumers." Resp. Br. 28. First, the parties' "expressed intent" was to arbitrate "all controversies" between them arising out of securities transactions. Second, the statement is irrelevant to the question of who decides whether claims fall within a six year period. DWR, as it frequently does in its brief, confuses the parties' "intent" not to arbitrate claims more than six years old with a purported intent to have the courts decide which claims are timely. Howsam respectfully submits that a decision by this Court in her favor will not jeopardize the rights of all parties to arbitration agreements, including consumers.[4]

DWR further contends that Howsam's and the SEC's argument that judicial determination of Rule 10304 timeliness issues would thwart FAA policies by slowing down the dispute resolution process "is both irrelevant and incorrect." Resp. Br. 30. It is neither. It is relevant because this Court has repeatedly held that one goal of the FAA is to encourage speedy and efficient dispute resolution. Howsam does not advocate that this goal take precedence over enforcing arbitration agreements according to their terms. Simply put, nothing in the parties' arbitration

[4] DWR's professed concern for customers is ironic in light of its and the securities industry's position that if a claim is not "arbitrable" under Rule 10304, it is also not litigable in court. *See, e.g., Dean Witter Reynolds v. McCoy*, 853 F. Supp. 1023, 1025 (E.D. Tenn. 1994), *aff'd*, 70 F.3d 1271 (6th Cir. 1995); *Roney & Co.*; *Conroy v. Merrill Lynch, Pierce, Fenner & Smith*, 899 F. Supp. 1471, 1476 (W.D.N.C. 1995), and cases cited therein.

agreement provides for judicial resolution of ancillary procedural issues such as timeliness.

Howsam's and the SEC's position is also correct. There can be no doubt that antecedent judicial proceedings under Rule 10304 result in extra costs and delays. The NASD itself recognizes this when it said, "[u]nder the proposed rule, customers (investors) will be assured that their claims will be heard either in court or in arbitration, and that they will not be subjected to *repeated, costly, time-consuming, and indeterminate battles* over the eligibility of their claim for arbitration." 63 Fed. Reg. 588, 592 (Jan. 6, 1998) (emphasis added). Jurisdictions holding that the six year rule is an arbitrability limitation require trial courts to hold fact-intensive "mini-trials" to determine when claims accrued. *See, e.g., Cohen*; *Painewebber, Inc. v. Hofmann,* 984 F.2d 1372, 1379-1382 (3d Cir. 1993); *Kidder, Peabody & Co. v. Brandt*, 131 F.3d 1001, 1004 (11th Cir. 1997).

Rule 10304 does not provide a "bright-line" for quick and easy determination. Courts have disagreed on how to determine the date from which the six year period begins to run. In *Osler v. Ware*, 114 F.3d 91, 93 (6th Cir. 1997), the court stated that accepting the transaction-date argument "would create situations in which certain claims would be barred before they even arose. Needless to say, we refuse to interpret the 'occurrence or event' language . . . in this manner." In *J.E. Liss & Co. v. Levin*, 201 F.3d 848, 851 (7th Cir. 2000), the court said "Rule 10304 does not bar a claim that arises within the six-year period merely because the securities involved in the claim were bought more than six years before the claim was filed." *See also* Mason, *Irreducible Disagreements*, 703-707, 712-716.

The NASD itself has not consistently interpreted the six year period as beginning to run on the date of the transaction. In 1991, the NASD Director of Arbitration was authorized by the National Arbitration Committee to use the date of discovery of the wrong-doing as the beginning date. Rush, *Securities Arbitration: The Six-Year*

Eligibility Rule, 26 Stetson L. Rev. 329, 344-345 (Fall, 1996). The rule itself speaks of the "occurrence or event giving rise to the act or dispute, claim or controversy." It could have stated, but did not, that the time begins to run from the date of the purchase or sale or other complained-of transaction.

The NASD has commented that,

> some courts, arbitrators, and the Director permitted certain claims to be arbitrated even though they appeared to be based on events more than six years old under a theory akin to equitable tolling. Other courts, some arbitrators, and, several years ago, the Director, applied a 'bright-line' transaction date test holding that the date of the transaction was determinative of the eligibility of a claim and that the limit could not be tolled.

63 Fed. Reg. at 590-591.

DWR's argument that it "defies common sense to subject parties to the time and expense of full arbitration proceedings, and only then to determine whether those proceedings were valid" (Resp. Br. 32) fails to take into account that the arbitrators' decision may obviate any need for judicial intervention. Furthermore, judicial review does not entail a retrial, but is simply a review under a deferential standard. Court application of the six year rule before consideration by the arbitrators is akin to submitting motions to dismiss to appellate courts before trial courts have considered them.

F. THE NASD'S STATEMENTS REGARDING WHO APPLIES RULE 10304 DO NOT SUPPORT DWR'S POSITION; THE SEC SUPPORTS HOWSAM'S POSITION

DWR's assertion that the NASD interprets its rules as calling for court enforcement of Rule 10304 is wrong. Resp.

Br. 37. The cited passage from 59 Fed. Reg. 39373, 39374 simply states the NASD's incorrect reading of *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643 (1986), as of July 1994. More recently, in 63 Fed. Reg. at 590, the NASD recognized that there is "significant confusion about who should decide eligibility issues. Some courts have held that eligibility was for the courts to decide; others have held that the arbitrators could decide the issue. In some cases, the courts have declined to decide the issue . . . ."

The SEC, which approves the NASD's rules after notice and comment (SEC Br. 1), asserts that Rule 10324 clearly indicates that arbitrators are to decide Rule 10304 questions. *See* 67 Fed. Reg. 19464, 19466 n.11 (April 19, 2002). The SEC's interpretation should be given substantial weight by the Court. *Cf. Udall v. Tallman*, 380 U.S. 1, 16 (1965) ("[w]hen faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration"); *Unemployment Comp. Comm'n v. Aragon*, 329 U.S. 143, 153 (1946) ("[t]o sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings").

II. CERTIORARI WAS PROVIDENTLY GRANTED

DWR urges the Court to dismiss Howsam's petition as improvidently granted because the NASD is attempting to amend Rules 10304 and 10324. Proposed changes to the rules have been pending for nearly a decade without any final action. Even though the proposed changes to Rules 10304 and 10324 have now been separated from changes to other rules, the SEC considered it necessary to submit the proposed rule changes for additional public

comment. The NASD and the SEC continue to evaluate comments and there is no certainty that the proposal will survive in its present form or that the SEC will approve it. The SEC, in 67 Fed. Reg. 19464, poses nine questions which indicate a number of concerns with the language and effect of the proposed rule changes. There is no basis for DWR's statement that "the SEC is expected to approve it." Resp. Br. 45.

Regardless of whether the proposed amendments are enacted, there are underlying issues of whether timeliness limitations contained in arbitration forum rules or in contracts are for courts or arbitrators to adjudicate.

Most importantly to Howsam, she and other public investors are entitled to relief under the existing rules. They should not have to continue to face expensive and time-consuming litigation of matters properly submitted to arbitration.

CONCLUSION

For the reasons stated in Howsam's and the SEC's briefs, this Court should hold that Rule 10304 is for the arbitrators to apply and reverse the judgment of the Tenth Circuit.

Dated: Denver, Colorado
August 21, 2002

Respectfully submitted,

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IN THE

Supreme Court Of The United States

KAREN HOWSAM, individually and as Trustee for the E. Richard Howsam, Jr. Irrevocable Life Insurance Trust dated May 14, 1982

Petitioner,

v.

DEAN WITTER REYNOLDS, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF *AMICI CURIAE* TRIAL LAWYERS FOR PUBLIC JUSTICE AND AARP IN SUPPORT OF NEITHER PARTY

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INTEREST OF *AMICI CURIAE*[1]

Trial Lawyers for Public Justice ("TLPJ") and AARP respectfully submit this brief as *amici curiae* in support of neither party urging the Court to make clear that even a broad arbitration agreement covering disputes over the arbitrability of claims (as petitioner alleges is before the court) does not relieve courts of their duty under the Federal Arbitration Act to determine the threshold questions of whether the parties entered into an agreement to arbitrate and, if so, whether the agreement is enforceable under applicable state contract law.

TLPJ is a national public interest law firm specializing in precedent-setting and socially significant civil litigation. In prosecuting cases throughout the federal and state courts, TLPJ seeks to advance consumers' and victims' rights, environmental protection, civil rights and civil liberties, workers' rights and workplace safety, the preservation and improvement of the civil justice system, and the protection of the poor and the powerless. TLPJ has become concerned over a trend whereby an increasing number of businesses are imposing mandatory arbitration systems against consumers in an attempt to cap their own liability and take away their victims' right to go to court. Four years ago, TLPJ established a Mandatory Arbitration Abuse Prevention Project to combat these abuses. During this time, we have been contacted repeatedly by consumers, and by their lawyers, who wished to pursue their claims through the civil

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[1] Pursuant to Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amici* and their counsel made a monetary contribution to the preparation or submission of the brief. Pursuant to Rule 37.3(a), letters of consent to file this brief from petitioner and respondent have been filed with the Clerk of the Court.

justice system and have their cases heard by a jury of their peers, but were unable to do so because of mandatory arbitration imposed by businesses. While TLPJ supports alternative dispute resolution that is truly consensual between the parties, our research and investigation have convinced us that, in many cases, corporate abuses of mandatory arbitration deny consumers access to a meaningful forum for the resolution of their legal claims.

AARP is a nonprofit, nonpartisan organization with more than 35 million members aged 50 and older. As the largest membership organization representing the interests of older Americans, AARP is greatly concerned about widespread fraudulent, deceptive, and unfair practices in a broad range of marketplace transactions, since older people are disproportionately victimized by many of these practices. AARP thus supports laws and public policies designed to protect their rights and to preserve the means for them to seek legal redress when they are harmed in the marketplace. An increasing number and range of businesses have, during the last several years, started to impose binding arbitration as a condition of obtaining products and services. AARP has filed *amicus curiae* briefs in this Court, as well as federal appellate courts and state supreme and appeals courts, addressing the importance of preserving court access for consumers, especially those with relatively small amounts in dispute, and ensuring that they can seek the full range of remedies that Congress and state legislatures enacted for their benefit. Consumers frequently must incur substantial costs when they are forced to have a dispute resolved in arbitration, and the arbitral forum often does not afford them many of the substantive and procedural protections they would have in court. These factors, combined with the unequal bargaining power of the parties to most consumer contracts, contribute to AARP's concern about

the contract formation process and underscore the importance of ensuring that courts retain their authority to determine the validity of contract provisions that otherwise seek to deprive consumers of access to court to resolve their underlying claims.

The parties in this case agree, as did both courts below, that the question presented requires examination of the Court's opinion in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995). *Amici* have a strong interest in the resolution of this case because any discussion of *First Options* could have enormous implications for consumers who resist attempts by some businesses to impose one-sided and often abusive arbitration systems as a condition of entering into everyday transactions. *First Options* holds that under the Federal Arbitration Act ("FAA"),[2] questions of arbitrability, i.e., whether a claim is covered by the arbitration agreement at issue, are presumptively for courts to decide but may be decided through arbitration where parties clearly and unmistakably intended to arbitrate such questions. *Id.* at 945. *First Options* is cautious about extending arbitration clauses to cover matters other than the parties' underlying claims. But some businesses are now advancing an expansive interpretation of *First Options* that requires consumers to relinquish *all* meaningful access to court by compelling arbitration of the threshold FAA issues of whether they entered into an enforceable arbitration agreement in the first place. Fortunately, these businesses so far have had only limited success in advancing these arguments.[3]

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[2] 9 U.S.C. §§ 1 *et seq.*

[3] *Compare Prevot v. Phillips Petroleum Co.*, 133 F. Supp. 2d 937, 939-40 (S.D. Tex. 2001) (rejecting employer's claim that non-English speaking employees must arbitrate question of whether its mandatory arbitration clause is unconscionable); *American Gen. Fin., Inc. v. Branch*, 793 So.2d 738 (Ala. 2000), *cert. denied*, 122 S. Ct. 342 (Oct. 9, 2001) (No.

Because these arguments citing *First Options* threaten to eliminate all meaningful access to court for consumers and individual workers by unmooring arbitration from its statutorily mandated basis in a valid contractual agreement under the FAA, *amici* submit this brief asking the Court to explicitly define the outer boundaries of *First Options'* holding regarding the resolution of arbitrability disputes. The Court should make clear that the threshold issues of whether a party entered into an agreement to arbitrate and, if so, whether that agreement is enforceable are matters exclusively for judicial determination under the FAA, even where *First Options* would permit arbitration of *subsequent* arbitrability disputes over whether *an existing and valid* arbitration agreement applies to a particular dispute between the parties.

STATEMENT OF CASE

This case arose out of a misrepresentation claim that Karen Howsam ("Howsam"), an investor, filed against Dean Witter Reynolds, Inc. ("Dean Witter"), her brokerage firm. In 1992, Howsam signed a client service agreement containing a mandatory arbitration provision drafted by Dean Witter. Pet. App. 3a. The arbitration clause provided in relevant part that:

> The Client agrees that all controversies between the Client and Dean Witter and/or any of its officers, directors, or employees, present or former, concerning or arising from (i) any account maintained with Dean Witter by client; (ii) any transaction involving Dean Witter and Client, whether or not such transaction occurred in such account or accounts; or (iii) the construction, performance or breach of this or any other agreement between us, whether such controversy arose prior to, on or subsequent to the date hereof, shall be determined by arbitration before any self-regulatory organization or exchange of which Dean Witter is a member.

Id.

After Howsam's misrepresentation claim arose, she initiated arbitration against Dean Witter in early 1997 before the National Association of Securities Dealers (NASD). *Id.* at 4a. In submitting her claims to NASD arbitration, Howsam signed a submission agreement stating that her claims would be arbitrated in accordance with the NASD Code of Arbitration Procedure (NASD Code). *Id.* at 4a-5a. Section 10304 of the NASD Code creates its own limitations period for the filing of claims before the NASD, stating that "[n]o dispute, claim or controversy shall be eligible for submission to arbitration under this Code where six (6) years have elapsed from the occurrence or event giving rise to the act or dispute, claim or controversy." *Id.* at 5a.

Dean Witter responded by filing suit against Howsam in the United States District Court for the District of Colorado, seeking a declaration that Howsam's claims were untimely under the NASD's rules and seeking to enjoin the arbitration. Pet. App. 6a. Dean Witter argued that the timeliness of Howsam's arbitration filing is a question of the "arbitrability"

00-1934) (same, in case involving consumer subprime lending), *with Berkley v. H&R Block Eastern Tax Servs, Inc.*, 30 S.W.3d 341, 344 (Tenn. App. 2000) (adopting tax refund anticipation loan dealer's argument that under *First Options* "the parties may contract to arbitrate the question of the validity and enforceability of the arbitration clause itself.")

of her claims that must be decided by a court. *Id.* at 7a. The district court granted Howsam's motion to dismiss Dean Witter's claims, holding that the arbitration agreement contained sufficient evidence that the parties intended to submit disputes over the arbitrability of claims to arbitration. *Id.*

The United States Court of Appeals for the Tenth Circuit reversed, holding that the timeliness of Howsam's filing under the NASD Code was a question of arbitrability that must be decided by a court. *Id.* The court of appeals relied on this Court's ruling in *First Options* that disputes over the arbitrability of claims are presumptively for courts to decide unless there is clear and unmistakable evidence showing that the parties intended to arbitrate arbitrability disputes. Pet. App. 16a-17a. Because the court found that the arbitration agreement at issue here did not clearly and unmistakably demonstrate that the parties intended to arbitrate arbitrability disputes, it remanded the case to the district court for a determination of whether or not Howsam's arbitration filing was timely. Pet. App. 18a-19a and 27a-28a.[4]

SUMMARY OF ARGUMENT

In addressing which types of disputes raise arbitrability questions covered by *First Options*, the Court should make clear that the FAA always requires judicial resolution of the threshold questions of whether a party entered into an

[4] The court of appeals also rejected Howsam's argument that a choice of law provision in the 1992 client service agreement displaced Tenth Circuit precedent and required application of New York law, under which a similar arbitration clause was found to require arbitration of this same type of dispute. *See id.* at 19-20. The court found that federal arbitration law, rather than state law, applied to the resolution of this dispute over who decides the NASD limitations question. *Id.* at 22. *Amici* do not address this dispute between the parties.

agreement to arbitrate and, if so, whether that agreement is enforceable under applicable state contract law.

A party's right to have a court decide whether it entered into an enforceable arbitration agreement before the court orders arbitration of any claims is critical because arbitration is purely a matter of contract, not a freestanding right, under the FAA. The FAA's procedural provisions condition the authority of a federal court to issue an order compelling arbitration on the existence of an enforceable agreement to arbitrate between the parties before the court. *See* 9 U.S.C. §§ 3 and 4. Similarly, the Act's substantive provision applies the same rules of state contract law to arbitration agreements that apply to any other contract. *See* 9 U.S.C. § 2. The Court thus ruled in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), that a court, rather than an arbitrator, must resolve allegations of fraudulent inducement or any other bases for revocation that are directed specifically at an arbitration agreement before the court can enforce the agreement.

First Options does nothing to alter the FAA's baseline requirement of an enforceable agreement as the precondition to an order compelling arbitration. In ruling that disputes over arbitrability, i.e., whether a particular claim is covered by an existing arbitration agreement, are sometimes subject to arbitration, *First Options* does not address who decides the separate and antecedent questions of whether parties did in fact enter into an agreement to arbitrate and, if so, whether that agreement is enforceable. The Court's recognition in *First Options* that "the question 'who has the primary power to decide arbitrability' turns upon what the parties agreed about *that* matter," 514 U.S. at 943 (emphasis in original), presupposes the existence of an enforceable agreement to arbitrate between the parties. *First Options* therefore is

consistent with *Prima Paint*'s ruling that courts, not arbitrators, must resolve disputes over the existence and enforceability of arbitration agreements. While most courts have correctly applied *First Options* only to disputes over the scope and interpretation of *existing* agreements, a small number of courts have adopted the arguments of businesses and improperly expanded *First Options* to serve as a basis for requiring arbitration of threshold disputes over whether parties entered into an enforceable agreement in the first place.

Since the question presented in this case requires the Court to discuss what constitutes an arbitrability question under *First Options*, the Court should make clear that arbitrability refers to disputes over whether an *existing and valid* arbitration agreement applies to a party's underlying legal claim. In so holding, the Court should state explicitly that *First Options* does not alter the FAA's baseline requirement that a court must, in the first instance, resolve any disputes over whether a party ever entered into an agreement to arbitrate and, if so, whether that agreement is enforceable under applicable state contract law. The FAA and this Court's repeated holdings should be read to establish that, *regardless* of the asserted contract language at issue, a party cannot be forced to relinquish its right of access to court and submit a claim to arbitration unless a court first determines that the party did in fact enter into a valid and enforceable agreement to arbitrate.

ARGUMENT

THE COURT SHOULD MAKE CLEAR IN DECIDING THIS CASE THAT THE FAA REQUIRES COURTS TO RESOLVE DISPUTES OVER THE EXISTENCE AND VALIDITY OF ARBITRATION AGREEMENTS.

Arbitration under the FAA is purely a matter of contract. Accordingly, "the FAA does not require parties to arbitrate when they have not agreed to do so . . ." *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989). In *First Options*, this Court recognized a presumption against requiring parties to arbitrate disputes over arbitrability because, as a matter of contract formation, parties are unlikely to consider this "rather arcane" issue when they enter into transactions. 514 U.S. at 945. Since *First Options* recognizes that arbitration of arbitrability disputes is *itself* purely a matter of contract just like arbitration of other disputes under the FAA, then it follows that courts must always decide the baseline questions of whether parties entered into an agreement to arbitrate and, if so, whether that agreement is enforceable under applicable state contract law.

A. The FAA's Text and the Decisions of this Court Demonstrate that Courts Always Must Determine the Existence of a Valid Agreement to Arbitrate.

The text of the FAA makes clear that a court must resolve all disputes concerning the existence and validity of an agreement to arbitrate before it can order parties to arbitrate their underlying claims. Section Four of the Act allows a federal court to order arbitration of disputes within its jurisdiction, but only "upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith

is not in issue. . ." 9 U.S.C. § 4. Similarly, Section Three permits federal courts to stay litigation and order arbitration "upon any issue referable to arbitration under an agreement in writing for such arbitration . . .upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, . . .providing the applicant for the stay is not in default in proceeding with such arbitration." 9 U.S.C. § 3. Finally, Section Two establishes the FAA's general rule of substantive law making written arbitration agreements enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The existence of an enforceable written agreement to arbitrate between the parties thus is a precondition to any court's authority to order claims into arbitration under the FAA.

Based on these provisions, the Court has recognized that the FAA requires judicial, rather than arbitral, resolution of disputes concerning the existence or revocability of arbitration agreements. In *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), the Court held that a claim of fraud in the inducement of an entire contract that contained an arbitration clause was referable to arbitration under the FAA because the arbitration provision was severable from the disputed contract. *Id.* at 404. At the same time, the Court explained that a claim of fraud in the inducement of the arbitration clause *itself* would have to be resolved by a court based on the command of Section Four of the Act. *Id.*[5] *Prima*

[5] Although Section 4 did not directly apply in *Prima Paint* because the plaintiff had filed its substantive claims in court rather than arbitration, the Court held that both Sections 3 and 4 of the FAA require federal courts to consider "issues relating to the making and performance of the agreement to arbitrate." *Id.*

Paint ruled that this requirement was consistent with the overall "statutory scheme" of the FAA because:

> As the "saving clause" in § 2 indicates, the purpose of Congress in 1925 was to make arbitration agreements as enforceable as other contracts, *but not more so. To immunize an arbitration agreement from judicial challenge on the ground of fraud in the inducement would be to elevate it over other forms of contract- -*a situation inconsistent with the "saving clause."

Id. at 404 n.12 (emphasis added). *Prima Paint* thus confirms that agreements to arbitrate are subject to challenge under the FAA based on the same requirements applicable to other contracts, and that the resolution of such challenges is exclusively a judicial function.

The Court's recognition in *AT&T Techs., Inc. v. Communications Workers of Am.*, 475 U.S. 643 (1986), that parties might draft arbitration agreements that cover disputes over the arbitrability of claims does not relieve courts of *their* duty to determine whether the parties entered into a valid agreement to arbitrate in the first place. In *AT&T Technologies*, the Court addressed the allocation of authority between courts and arbitrators under collective-bargaining agreements entered into pursuant to Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185(a). The question presented was whether a court or an arbitrator should resolve an arbitrability dispute arising out of a collective bargaining agreement that contained an arbitration clause. *AT&T Techs.*, 475 U.S. at 644. The Court defined arbitrability as referring to questions of "whether a collective bargaining agreement creates a duty for the parties to arbitrate the particular grievance." *Id.*

at 649. Proceeding from this definition of arbitrability as referring to the scope or interpretation of an existing and valid agreement (facts that were not in dispute), *AT&T Technologies* held that the arbitrability of a particular claim "is undeniably an issue for judicial determination," but then qualified this holding by stating "[u]nless the parties clearly and unmistakably provide otherwise . . . ." *Id.*

The holding in *AT&T Technologies* that disputes over the scope of arbitration agreements should normally be resolved by courts is grounded in contract law. The Court found that "'[t]he duty to arbitrate being of contractual origin, a compulsory submission to arbitration cannot precede judicial determination that the collective bargaining agreement does in fact create such a duty.'" *Id.* (quoting *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 546-47 (1964)). Thus, even where an asserted arbitration agreement would empower an arbitrator to determine the arbitrability of individual claims, a party has the right under federal law to a judicial determination as to the existence of an enforceable agreement to arbitrate.

In *First Options*, the Court applied to the FAA the principles set out in *AT&T Technologies*. *First Options* arose out of a stock clearing company's attempt to collect debts owed by a wholly owned investment company and its individuaal owners. Pursuant to an arbitration agreement between the companies, the creditor initiated arbitration against thee debtor company and against its two owners, who had not signed the agreement in their individual capacity. *First Optinons*, 514 U.S. at 940-41. The individuals contested the arbitrator's jurisdiction, and then sought judicial review of the arbitrator's assertion of jurisdiction over the claims against them. *Id.* The main question presented to the Court concerned the proper

standard of judicial review of the arbitrator's assertion of jurisdiction. *Id.* at 942.

The Court ruled that "because the Kaplans did not clearly agree to submit the question of arbitrability to arbitration, . . .the arbitrability of the Kaplan/First Options dispute was subject to independent review by the courts." *Id.* at 947. On the facts of the case, the Kaplans had not agreed to submit *any* disputes to arbitration because they never entered into an agreement to arbitrate with First Options. *Id.* at 941. The Court recognized that the FAA permits parties to draft arbitration clauses that cover disputes over the arbitrability of individual claims, *id.* at 943, but it never suggested that if the First Options/MKI agreement *had* clearly covered arbitrability disputes, it would have required the Kaplans, as *non-signatories to that agreement*, to forego access to court and submit to arbitration. Such creation of a party's duty to arbitrate in the absence of an agreement to do so would have been contrary to decades of precedent interpreting and applying the FAA.

Like the Court's prior decisions involving the FAA, *First Options* is grounded in contract principles. The Court applied these principles to the difficult question of who decides arbitrability under the Act. In recognizing that "the question 'who has the primary power to decide arbitrability' turns upon what the parties agreed about *that* matter," 514 U.S. at 943 (emphasis in original), *First Options* presupposes the existence of an enforceable agreement to arbitrate between the parties. Still, the Court proceeded cautiously in this area by recognizing a presumption *against* submitting arbitrability disputes to an arbitrator, reversing the normal presumption regarding the scope of agreements under the FAA. *First Options*, 514 U.S. at 945. This reverse presumption is based entirely on the need for a party's *meaningful* assent to the arbitrator's authority:

> the "who (primarily) should decide arbitrability" question is rather arcane. A party often might not focus upon that question or upon the significance of having arbitrators decide the scope of their own powers. And, given the principle that a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration, one can understand why courts might hesitate to interpret silence or ambiguity on the "who should decide arbitrability" point as giving the arbitrators that power, for doing so might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide.

Id. Since *First Options* highlights the Court's long-standing recognition that "arbitration is simply a matter of contract," *id.* at 943, it is perfectly consistent with the Court's earlier ruling in *Prima Paint* that only courts have authority under the FAA to resolve disputes over the existence and validity of an agreement to arbitrate.

B. The Weight of Authority Post-*First Options* Continues to Support the Requirement that Courts Alone Determine the Existence and Enforceability of Arbitration Agreements.

After *First Options*, some businesses began drafting mandatory consumer and employment arbitration clauses that explicitly cover disputes over arbitrability. These businesses have then argued based on the Court's discussion of arbitrating arbitrability disputes in *First Options* where there was no arbitration agreement and based on the Court's imprecise

definition of arbitrability as referring to "whether [the parties] agreed to arbitrate the merits," *id.* at 942, that *First Options* requires arbitration of challenges to whether the parties entered into an enforceable agreement to arbitrate in the first place. In essence, this argument requires a court to rubberstamp any broadly worded arbitration clause, enforcing the purported waiver of a consumer's or worker's right of access to court *without regard* to the FAA's requirement of an enforceable agreement under applicable state contract law. Most courts presented with this argument have rejected it, but a small number have taken the bait and abdicated their duty under the FAA to ensure the existence of an enforceable agreement *before* they order parties out of court.

Courts rejecting this argument for a radical expansion of *First Options* have placed that decision in context and continue to recognize the FAA's contractual underpinnings. One of the first courts to consider the effect of *First Options* held that it does not change *Prima Paint's* requirement that a court decide any allegation that an arbitration clause is generally unenforceable; it only permits parties to agree to arbitrate whether a particular claim is arbitrable after such allegations have been resolved. *Aviall, Inc. v. Ryder Sys., Inc.*, 913 F. Supp. 826, 831 (S.D.N.Y. 1996), *aff'd*, 110 F.3d 892 (2d Cir. 1997). The *Aviall* court found that, under *First Options*, "the related and antecedent issue of whether an agreement to arbitrate is a contract of adhesion, fraudulently induced, or otherwise revocable, is an issue for the court as well, because *essential to the First Options inquiry is the assumption that an*

agreement to arbitrate was made voluntarily." *Id.* (emphasis added).[6]

The limited secondary authority examining the effect of *First Options* is in accord with this approach. As one commentator explained:

> The federal presumption [in favor of arbitration] should not be permitted to taint the threshold question of whether an agreement exists, a pure question of state law. . . . *The question of whether a valid arbitration agreement exists is not a question about the scope of arbitrable issues. The scope of arbitrable issues is not implicated until after a court has decided an agreement exists.*

Note, Tripping on the Threshold: Federal Courts' Failure to Observe Controlling State Law Under the Federal Arbitration

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[6] *See also Berger v. Cantor Fitzgerald Sec.*, 942 F. Supp. 963, 965 (S.D.N.Y. 1996) (in employment discrimination case under Title VII and state civil rights statutes, adopting *Aviall's* interpretation of *First Options*); *Prevot v. Phillips Petroleum Co.*, 133 F. Supp. 2d 937, 939-40 (S.D. Tex. 2001) (in workplace injury case, rejecting employer's argument that non-English speaking workers' allegation that arbitration clause is unconscionable must be arbitrated); *Oakwood Mobile Homes, Inc. v. Barger*, 773 So.2d 454, 459 (Ala. 2000) (in case involving consumer claims against mobile home manufacturer, following *Aviall* and finding that claim of fraud in inducement of arbitration agreement covering arbitrability disputes is antecedent to enforcement); *Green Tree Financial Corp. of Ala. v. Wampler*, 749 So.2d 409, 413 (Ala. 1999) (in consumer case involving mobile home financing, holding that under *First Options*, even where arbitration clause covers arbitrability disputes, court must decide challenges to enforceability of arbitration clause).

Act, 51 DUKE L.J. 521, 537 (2001) (emphasis added).[7] This understanding of *First Options* is consistent with the long-standing principle of federal law that the power of private arbitrators is not free-standing and plenary, but rather is strictly a matter of voluntary contractual agreement.[8]

Prompted by businesses that are determined to deprive consumers and other claimants of any meaningful access to court, a small number of courts have abandoned this principle by expanding *First Options* to sanction mandatory arbitration of allegations challenging the very existence or enforceability of a purported agreement to arbitrate. One state court of appeals ordered arbitration of consumer claims challenging the practices of a tax "refund anticipation loan" provider without ever deciding the consumers' claim that the lender's arbitration clause was unenforceable. Instead, the court found that the lender's arbitration clause covered disputes regarding the validity and enforceability of the arbitration clause itself, and that "[t]he United States Supreme Court has decided that parties may contract to arbitrate this type of dispute under the FAA even if state law would prevent arbitration." *Berkley v. H & R*

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[7] *See also* Comment, Prima Paint to First Options: The Supreme Court's Procrustean Approach to the Federal Arbitration Act and Fraud, 38 HOUS. L. REV. 335, 364 (2001) (noting with approval cases recognizing that "the assumption that an agreement to arbitrate was voluntarily made is essential to the First Options inquiry" and therefore that "the related and antecedent question of whether the agreement was a product of fraud, unconscionability, or coercion must be an issue for the courts . . . .")

[8] *See generally*, Archibald Cox, Reflections Upon Labor Arbitration, 72 HARV. L. REV. 1482, 1507 (1959) ("Possibly it would be wiser . . .to treat [arbitrators] as courts of general jurisdiction. This solution cannot be imposed in blanket fashion, however, so long as arbitration is consensual and the function of the court is to enforce a voluntary undertaking.")

Block Eastern Tax Servs., Inc., 30 S.W.3d 341, 344 (Tenn. App. 2000), *appeal denied* (Tenn. Nov. 6, 2000), *cert. denied*, 532 U.S. 971 (2001).[9]

Under this expansion of *First Options*, a consumer or worker who might never have agreed to arbitrate must forego access to court and proceed through private arbitration in order to find out whether a document proffered by a defendant that contains the words "arbitrate arbitrability disputes" creates an enforceable agreement. The Court never has sanctioned this practice. *First Options* addresses the very different issue of whether an arbitrator can have authority to decide the scope of a valid arbitration agreement. Even here, *First Options* warned that courts should proceed with caution because of the "arcane" nature of disputes over who decides arbitrability. But this minority of courts shows no caution whatsoever in expanding *First Options* to require arbitration of disputes over the very existence and legality of an arbitration agreement, and in discerning, for example, a low income borrower's "clear and unmistakable" intent to waive all meaningful access to court based entirely on a few words in a lender-drafted document. This approach is not consistent with *First Options* and does not comport with the voluntary contractual underpinnings of arbitration under the FAA.

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[9] *See also Perry v. Hyundai Motor Am., Inc.*, 744 So.2d 859, 867 (Ala. 1999) (holding that *First Options* sanctions arbitration of disputes involving "waiver, enforceability, validity, scope of the arbitration agreement"); *In re Oakwood Mobile Homes, Inc.*, 987 S.W.2d 571, 573 n.3 (Tex. 1999) (holding in consumer case against mobile home seller that, under the FAA, issue of whether terms and conditions of arbitration clause are unconscionable must be arbitrated).

C. This Court's Decisions Grounding the FAA in Contract Law Provide a Base Level of Fairness for Parties with Limited Choice Regarding Arbitration.

The FAA's requirement for a judicial determination that parties entered into an enforceable agreement to arbitrate under applicable state contract law principles is more than a mere formality. In holding that statutory claims of workers and other individuals are subject to arbitration under the FAA, the Court specifically pointed to Section Two's savings clause and warned that "'courts should remain attuned to well-supported claims that the agreement resulted from overwhelming economic power that would provide grounds for the revocation of any contract.'" *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33 (1991)(quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627 (1985) (internal quotation omitted)). In subsequently defining the scope of the FAA's preemptive effect, the Court reiterated that "generally applicable contract defenses such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2." *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996). Under the FAA, these principles of state contract law are the primary source of protection for consumers and other individuals against unknowing waivers of their rights and against unfair and one-sided arbitration systems.[10]

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[10] *See, e.g., Fleetwood Enterprises, Inc. v. Gaskamp*, 280 F.3d 1069 (5th Cir. 2002) (holding that minor children injured by exposure to formaldehyde in mobile home are not bound by manufacturer's arbitration clause signed by parents before they were born); *Gourley v. Yellow Transp., LLC*, 178 F. Supp. 2d 1196 (D. Colo. 2001) (holding that female employees' sex discrimination claims did not have to be arbitrated because asserted agreement gave employer unilateral power to interpret, modify, rescind, or supplement its terms).

An expansion of *First Options* to require arbitration of the threshold questions that precede disputes over the scope of an arbitration agreement would read the contract requirements out of the FAA and leave consumers, workers, and other parties of limited bargaining power with little or no ability to protect their rights. This Court has proclaimed repeatedly that "the FAA is 'at bottom a policy guaranteeing the enforcement of private contractual arrangements,'"[11] that the Act does no more than place arbitration agreements "'upon the same footing as other contracts,'"[12] and that "the FAA does not require parties to arbitrate when they have not agreed to do so."[13] A requirement that parties arbitrate disputes over whether they ever entered into an enforceable arbitration agreement would fundamentally alter the nature of arbitration under the FAA, and drastically diminish the rights of individual parties.

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[11] *See, e.g.,Equal Employment Opportunity Comm'n v. Waffle House, Inc.*, 534 U.S. 279, 122 S. Ct. 754, 764 (2002) (quoting *Mitsubishi Motors*, 473 U.S. at 625).

[12] *Volt Info. Sciences*, 489 U.S. at 474 (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974)) (internal quotation omitted).

[13] *Volt Info. Sciences*, 489 U.S. at 478.

CONCLUSION

In determining the effects of *First Options* and the wording of Dean Witter's arbitration clause on the dispute over the timeliness of Howsam's arbitration filing, the Court should make clear that any dispute regarding the existence and enforceability of an arbitration agreement must be resolved by a court under the FAA.

Respectfully submitted,

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BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Petitioner and respondent have agreed to arbitrate "all controversies * * * concerning or arising from" petitioner's securities accounts with respondent, including "the construction, performance or breach of this or any other agreement between us." The arbitration agreement makes applicable the rules of the arbitral forum selected by petitioner, the National Association of Securities Dealers, Inc. (NASD). The NASD rules provide, among other things, that the "arbitrators shall be empowered to interpret and determine the applicability of all" the rules. The question presented is whether the arbitrator, rather than a court, is to decide whether petitioner's claims are barred by the NASD rule that no claim is "eligible for submission to arbitration" by the NASD if more than six years "have elapsed from the occurrence or event giving rise to the" claim.

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BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE SECURITIES AND EXCHANGE COMMISSION

Under Section 19 of the Securities Exchange Act of 1934 (Exchange Act), 15 U.S.C. 78s, the Securities and Exchange Commission (SEC) oversees and approves the rules of the National Association of Securities Dealers, Inc. (NASD), and other securities industry self-regulatory organizations (SROs), such as the New York Stock Exchange (NYSE) and the American Stock Exchange (AMEX), to ensure that the rules adequately protect the rights of customers. See *Shearson/American Express Inc.* v. *McMahon*, 482 U.S. 220, 233-234 (1987). The SEC has a substantial interest in ensuring that SRO rules governing the arbitration of customer disputes are interpreted correctly, so that arbitration is fair and not unnecessarily complex, time consuming or expensive.[1]

[1] The NASD is registered with the SEC as a national securities association under Section 15A of the Exchange Act, 15 U.S.C. 78o-3. It is

The question presented in this case is whether NASD Rule 10304, which imposes a time limit for submission of claims to arbitration by the NASD, is to be applied by the arbitrator, subject to judicial review as provided in the Federal Arbitration Act, 9 U.S.C. 1 *et seq.*, or is instead to be applied by a court in advance of arbitration. The holding of the court of appeals that the rule is to be applied by a court in advance of arbitration imposes a costly and time-consuming judicial proceeding antecedent to arbitration that is not required by the SEC-approved NASD rules or by the parties' arbitration agreement. The SEC therefore has a strong interest in the correct resolution of the question presented.

STATEMENT

1. Petitioner Karen Howsam was a customer of respondent Dean Witter Reynolds, Inc., a securities broker-dealer, from the spring of 1986, when she purchased interests in four limited partnerships, until late 1994, when she closed her accounts. Pet. App. 3. In March 1997, petitioner commenced an arbitration proceeding against respondent pursuant to the arbitration clause in her customer agreement. *Id.* at 4. That agreement, which was drafted by respondent, provides in relevant part:

> The Client agrees that all controversies between the Client and Dean Witter * * * concerning or arising from (i) any account maintained with Dean Witter by the Client; (ii) any transaction involving Dean Witter and the Client, * * * or (iii) the construction, performance or breach of this or any other agreement between us * * * shall be determined by arbitration before any self-regulatory organization or exchange of which Dean Witter is a member. The Client may elect which of these arbitration forums shall hear the matter.

Access Client Services Agreement Between Karen Howsam and Dean Witter Reynolds, Inc. ¶ 19 (Aug. 26, 1992) (1992 Agreement). The agreement also provides that it "shall be construed and enforced in accordance with the laws of the State of New York without reference to choice of law doctrine." *Id.* ¶ 18.

Petitioner alleges that respondent made material misrepresentations about her investments before she purchased them and that the investments were unsuitable for someone with her investment needs. Pet. App. 4. She further alleges that respondent continued to inform her that the investments were sound, despite indications to the contrary, and that the misinformation impeded her understanding of the true nature of the investments until 1994. *Ibid.*

Petitioner initiated arbitration before the NASD by executing a Uniform Submission Agreement, as required by the NASD. Pet. App. 4. The Submission Agreement incorporates the NASD Code of Arbitration Procedure (NASD Code) by providing that the parties "hereby submit the present matter in controversy, as set forth in the attached statement of claim, * * * to arbitration in accordance with the Constitution, By-Laws, Rules, Regulations, and/or Code of Arbitration Procedure of the sponsoring organization." Uniform Submission Agreement ¶ 1 (Apr. 16, 1997) (1997 Agreement). Although only petitioner signed the 1997 Agreement, respondent's signature was unnecessary: the 1992 Agreement gave petitioner the power to select the

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the only registered national securities association. Subject to comprehensive oversight by the SEC, the NASD is responsible for regulation of those who sell securities in the over-the-counter market. As a result of Section 15(b)(8) of the Exchange Act, 15 U.S.C. 78*o*(b)(8), broker-dealers must belong to the NASD unless they execute transactions only on a registered national exchange. In the summer of 2000, the component of the NASD that administers alternative dispute resolution was incorporated as a separate subsidiary, NASD Dispute Resolution, Inc. See <http://www.nasdadr.com/whatdr.asp#nasd_dispute>. For simplicity, this brief refers to both entities as the NASD.

arbitral forum, and the 1997 Agreement was a necessary consequence of petitioner's selection of the NASD. See Pet. App. 5.

The NASD Code contains a provision entitled "Time Limitation Upon Submissions," which provides that "[n]o dispute, claim or controversy shall be eligible for submission to arbitration under this Code where six (6) years have elapsed from the occurrence or event giving rise to the act or dispute, claim or controversy." NASD Rule 10304. Another provision of the NASD Code provides that the "arbitrators shall be empowered to interpret and determine the applicability of all provisions under [the NASD Code.]" NASD Rule 10324.[2]

2. Respondent filed an action in the United States District Court for the District of Colorado in which respondent requested a declaratory judgment that petitioner's

[2] The NASD Code was renumbered in May 1996. See Norman Poser, *Making Securities Arbitration Work*, 50 SMU L. Rev. 277, 291 n.88 (1996). Current Rule 10304 was formerly Rule 15, and current Rule 10324 was formerly Rule 35. *Id.* at 291 & n.88, 334 & n.349. The SEC is considering a proposal by the NASD to revise Rules 10304 and 10324 to provide, among other things, that the NASD Director of Arbitration, rather than either a court or an arbitrator, will determine whether a claim is barred by the six-year time limit in Rule 10304. See 67 Fed. Reg. 19,464 (2002). The deadline for submission of comments on the proposed rule changes was May 10, 2002, and the SEC is currently reviewing the comments received. Although adoption of the new rules would reduce the future importance of this case, the proposed rule changes would not be retroactive, see *id.* at 19,466, and therefore they would not affect the outcome of this case. Moreover, the case would still be of some continuing significance because the proposed rules would apply only to arbitrations before the NASD and would not change rules similar to the current NASD Rule 10304 that are in effect at other SROs. See, *e.g.*, NYSE Rule 603; Pacific Exchange Rule 12.4. Although the NASD conducts about 90% of SRO arbitrations, other SROs also conduct a substantial number of arbitrations. See Securities Industry Conference on Arbitration, *Eleventh Report* 111, 113, 117, 119, 121, 125 (July 2001).

claims are untimely under NASD Rule 10304 and thus not eligible for arbitration before the NASD. Pet. App. 5-6. Respondent also sought to enjoin the arbitration pending resolution of its court action. *Id.* at 6.

Petitioner moved to dismiss respondent's district court action. Petitioner contended that the parties had agreed that the arbitrator would decide all controversies arising out of her securities accounts with respondent and the agreements concerning those accounts. Pet. App. 6. Respondent argued that compliance with NASD Rule 10304 concerns the arbitrability of the dispute, and, therefore, under this Court's precedents, the issue is for the courts to decide, unless the parties have clearly and unmistakably manifested an intent to submit the issue to the arbitrator. Furthermore, respondent contended, its agreement with petitioner does not contain a sufficiently clear and unmistakable expression of intent on that issue, so Rule 10304 should be applied by the courts. *Id.* at 6-7.

The district court ruled that the broad language of the arbitration provision, which, as noted above, provides for the arbitration of "all controversies" between the parties, including "construction" of the arbitration agreement, authorizes the arbitrator to apply the six-year rule to the facts of petitioner's claims. Pet. App. 31-36. The court therefore granted the motion to dismiss for lack of subject matter jurisdiction and entered judgment for petitioner. *Id.* at 37-38.

3. The United States Court of Appeals for the Tenth Circuit reversed the judgment of the district court. Pet. App. 1-30. Based on its analysis of this Court's decisions in *AT&T Technologies, Inc.* v. *Communications Workers*, 475 U.S. 643 (1986), and *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938 (1995), as well as the Tenth Circuit's prior decision in *Cogswell* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 78 F.3d 474 (1996), the court of appeals concluded that the

question whether petitioner's claims are barred by the time limit in NASD Rule 10304 is an element of the arbitrability of her claims. Pet. App. 16-17. The court therefore applied the principle that the issue of arbitrability is to be decided by the courts unless the parties have clearly and unmistakably provided otherwise. *Id.* at 17 (quoting *First Options*, 514 U.S. at 944 (citing *AT&T*, 475 U.S. at 649)).

The court of appeals rejected petitioner's contention that, because the agreement contains a choice-of-law clause providing that the agreement is subject to New York law, the court was bound by the interpretation of the NASD rules and a similar arbitration clause that the New York Court of Appeals adopted in *Smith Barney Shearson Inc.* v. *Sacharow*, 91 N.Y.2d 39 (1997). Pet. App. 19-24. Instead, relying on its own prior decision in *Cogswell*, the Tenth Circuit concluded that neither the broad arbitration provision in the customer agreement nor the applicable provisions of the NASD Code clearly and unmistakably provide that the arbitrator will decide whether claims are barred by NASD Rule 10304. *Id.* at 18-19 & n.4, 24-28.

SUMMARY OF ARGUMENT

The parties' arbitration agreement, the NASD rules that it makes applicable, and the policies of the Federal Arbitration Act, 9 U.S.C. 1 *et seq.*, all indicate that the arbitrator, rather than the a court, is to decide whether petitioner's claims were filed within the time limit prescribed by NASD Rule 10304. Because arbitration is generally a matter of contract between the parties, whether the arbitrator or a court decides a particular question is determined by the parties' agreement. In ascertaining what the parties have agreed, courts generally apply ordinary principles of state contract law. Federal law, based on the Federal Arbitration Act, however, imposes some constraints.

The Federal Arbitration Act embodies a federal policy favoring enforcement of arbitration contracts and ensuring

that arbitration, when it has been selected by parties to a contract, is speedy and not subject to delay and obstruction in the courts. When arbitration agreements are subject to the Act, as the agreement in this case is, federal law generally requires that any doubts concerning the scope of arbitrable issues be resolved in favor of arbitration. There is, however, an exception to the presumption in favor of having the arbitrator resolve disputed issues when the issue in dispute is arbitrability itself. In that circumstance, a contrary presumption applies, and a court may conclude that the parties agreed to arbitrate arbitrability only if there is clear and unmistakable evidence that they did so. See *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938 (1995).

Because of that contrary presumption, a broad view of the questions encompassed within arbitrability could undermine the Federal Arbitration Act's fundamental goals of enforcing arbitration agreements and preventing delay and obstruction of arbitration proceedings in the courts. This Court has therefore been careful to construe arbitrability narrowly. The Court's decisions limit arbitrability to two questions central to whether the parties have agreed to subject themselves to the power of an arbitrator: whether the parties are bound by a valid arbitration agreement, and whether the subject matter of their underlying dispute falls within that agreement. *E.g.*, *First Options*, *supra*; *AT&T Tech., Inc.* v. *Communications Workers*, 475 U.S. 643 (1986). Arbitrability does not include whether the parties have complied with contractual and other time limits on the submission of claims. Those issues are instead subject to the general presumption in favor of resolution by the arbitrator. See *John Wiley & Sons* v. *Livingston*, 376 U.S. 543, 555-559 (1964); *International Union of Operating Eng'rs* v. *Flair Builders, Inc.*, 406 U.S. 487, 491-492 (1972).

The presumption that the arbitrator is to resolve questions of timeliness advances the purposes behind the Federal

Arbitration Act. When the parties enter into a valid arbitration agreement, and the agreement covers the subject matter of their underlying dispute, then they most likely intend that the arbitrator will resolve all issues that arise concerning their dispute. If courts resolved timeliness questions in proceedings antecedent to arbitration, courts would be required to delve into the facts of the underlying disputes, because resolving timeliness questions frequently requires interpretation and factual assessment of the underlying claims. Requiring such extensive mini-trials in advance of arbitration would frustrate the Federal Arbitration Act's goal that parties to arbitration not face lengthy and costly delays in court. Indeed, the costs of antecedent judicial proceedings could lead some claimants to forgo their claims entirely.

NASD Rule 10304 imposes a time limit on submission of claims, and it therefore presents not a question of arbitrability but an ancillary procedural question that is presumptively to be decided by the arbitrator. That conclusion holds true even though Rule 10304 is phrased in terms of whether a claim is "eligible for submission to arbitration." This Court's precedents and the policies they reflect do not support treating a timeliness requirement as an issue of arbitrability merely because the timeliness requirement is phrased in certain language. See *John Wiley*, 376 U.S. at 555-559.

Because NASD Rule 10304 does not present an arbitrability issue, the court of appeals erred in presuming that a court is to apply the rule in the first instance unless the parties clearly and unmistakably provided otherwise. The court of appeals should instead have applied ordinary principles of state contract law, supplemented by the general federal law presumption in favor of dispute resolution by the arbitrator. Under those principles it is clear that the parties

agreed that the arbitrator would decide whether petitioner's claims are timely under Rule 10304.

The arbitration agreement contains a broad arbitration clause that provides for arbitration of "all controversies" between the parties, including controversies about construction or performance of the agreement. The agreement also incorporates all the NASD arbitration rules, which include both the time limit in NASD Rule 10304 and a rule stating that the arbitrator is "empowered to interpret and determine the applicability of all" the rules. NASD Rule 10324. Thus, if the agreement is interpreted using the presumption favoring arbitration, there can be no doubt that it provides for the arbitrator to interpret and apply Rule 10304 in the first instance. Indeed, the agreement clearly and unmistakably provides for the arbitrator to apply Rule 10304 even if the contrary presumption against the arbitration of arbitrability were applicable.

ARGUMENT

WHETHER PETITIONER'S CLAIMS ARE BARRED BY THE TIME LIMIT IN NASD RULE 10304 IS FOR THE NASD ARBITRATOR TO DECIDE

Arbitration is generally "a matter of contract between the parties." *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938, 943 (1995) (citing *inter alia AT&T Tech., Inc.* v. *Communications Workers*, 475 U.S. 643, 649 (1986)).[3] Therefore,

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[3] Petitioner sought arbitration pursuant to an arbitration agreement with respondent, and most arbitrations arise from arbitration agreements. This brief therefore analyzes the question presented under the legal framework governing arbitration by agreement of the parties. The rules of the NASD, however, give customers the right to demand arbitration of disputes with NASD member firms even absent an arbitration agreement between the customer and the firm. See NASD Rule 10301(a). The NASD rules further prohibit customer agreements from including provisions that limit or contradict the rules of any SRO or that limit the ability of customers to file claims in arbitration. See NASD Rule

whether a particular dispute between the parties to an arbitration agreement is decided in the first instance by the arbitrator or by a court depends on the parties' agreement. If the parties have agreed to submit the issue to arbitration, then the arbitrator decides the issue. If the parties have not agreed to submit the issue to arbitration, then the court decides the issue. See *First Options*, 514 U.S. at 943. Here, the parties' agreement (including the NASD rules of arbitration that it makes applicable), interpreted with due regard for the policies underlying the Federal Arbitration Act, provides that the arbitrator, not a court, is to decide in the first instance whether petitioner's claims are barred by the time limit in NASD Rule 10304.[4]

A. When Parties Have Agreed To Arbitration, They Are Presumed To Intend That The Arbitrator Will Resolve Their Disputes, Unless The Disputed Issue Is Arbitrability Itself

When deciding whether the parties have agreed to arbitrate a certain matter, courts generally apply ordinary principles of state contract law. See *First Options*, 514 U.S.

3110(f)(4). As discussed below, one of the NASD rules also clearly provides that arbitrators are authorized to apply the other NASD rules, including the time limit in NASD Rule 10304. See pp. 28-30, *infra* (discussing NASD Rule 10324). Thus, even if this case were governed solely by the NASD rules rather than by the terms of the parties' arbitration agreement, the arbitrator, rather than a court, would decide whether claims had been submitted in compliance with Rule 10304's time limit.

[4] Arbitrators' decisions on the time-limit issue, like their decisions on the merits of underlying disputes, are subject to judicial review upon conclusion of the arbitration to ensure, among other things, that the arbitrators did not "exceed[] their powers," 9 U.S.C. 10(a)(4), or act in "manifest disregard" of the law, see *First Options*, 514 U.S. at 942 (quoting *Wilko* v. *Swan*, 346 U.S. 427, 436-437 (1953), overruled on other grounds, *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477 (1989)).

at 944; *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62-63 & n.9 (1995); *Volt Info. Sciences, Inc.* v. *Board of Tr. of Leland Stanford Junior Univ.*, 489 U.S. 468, 475-476 (1989). Federal law, however, imposes some constraints on the application of state law. See *First Options*, 514 U.S. at 944-945. The federal law principles flow from the Federal Arbitration Act, 9 U.S.C. 1 *et seq.*, which "creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate." *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 25 n.32 (1983).

The Federal Arbitration Act "is a congressional declaration of a liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24. The Act, which applies broadly to arbitration agreements concerning "any maritime transaction or a contract evidencing a transaction involving commerce," provides that such agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. 2. The Federal Arbitration Act's principal purposes are "to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate" and to "ensur[e] that private arbitration agreements are enforced according to their terms." *Volt Info. Sciences, Inc.*, 489 U.S. at 478. The Act also evinces an "unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts." *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967). See H.R. Rep. No. 96, 68th Cong., 1st Sess. 2 (1924) (noting that arbitration can eliminate "the costliness and delays of litigation").

For arbitration agreements covered by the Act, such as the agreement in this case, the "Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration,

whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24-25. See also *First Options*, 514 U.S. at 944-945. Thus, "[a]n order to arbitrate the particular [dispute] should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *AT&T*, 475 U.S. at 650 (quoting *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-583 (1960)).

The presumption in favor of having the arbitrator resolve disputed issues both advances the federal policy favoring arbitration and reflects the likely intent of the parties. See *First Options*, 514 U.S. at 945; *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985). "[W]hen the parties have a contract that provides for arbitration of some issues," they "likely gave at least some thought to the scope of arbitration." *First Options*, 514 U.S. at 945. Therefore, "given the law's permissive policies in respect to arbitration, * * * the law * * * insist[s] upon clarity before concluding that the parties did *not* want to arbitrate a related matter." *Ibid.*

There is, however, an exception to the general presumption that the parties have agreed that any disputed issue will be resolved by the arbitrator. When the issue to be resolved is "arbitrability" itself—whether the parties "agreed to arbitrate" one or more underlying disputes, the general presumption does not apply. *First Options*, 514 U.S. at 942, 944-945. Instead, the parties are presumed to intend that the courts, rather than the arbitrator, will decide the question of arbitrability. "Courts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so." *Id.* at 944 (quoting *AT&T*, 475 U.S. at 649). See *Warrior & Gulf*, 363 U.S. at 583 n.7.

The Court has explained that the reason for the presumption against arbitration of arbitrability is that the question who should decide arbitrability is "rather arcane." *First Options*, 514 U.S. at 945. "A party often might not focus upon that question," and, therefore, a presumption that the arbitrator has the power to decide arbitrability "might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide." *Ibid.*

B. Whether A Party Has Complied With An Applicable Time Limit On Claim Submission Is Not A Question Of Arbitrability

As explained above, classifying a dispute as one about arbitrability not only exempts the dispute from the general presumption in favor of arbitration, but also subjects it to a contrary presumption against arbitration. As a result, a broad view of the questions encompassed within the concept of arbitrability could undermine the Federal Arbitration Act's fundamental goals of enforcing arbitration agreements and protecting the arbitration procedure from delay and obstruction in the courts. Mindful of that concern, this Court has construed arbitrability narrowly.

1. Arbitrability includes only the questions whether the parties are bound by a valid agreement to arbitrate and whether the subject matter of the underlying dispute is within that agreement

The Court has used a variety of different formulations to describe arbitrability. See, *e.g.*, *First Options*, 514 U.S. at 942 ("whether [the parties] agreed to arbitrate the merits" of their dispute); *AT&T*, 475 U.S. at 649 (whether the "agreement creates a duty for the parties to arbitrate the particular grievance"); *John Wiley & Sons* v. *Livingston*, 376 U.S. 543, 547 (1964) (whether the party "is bound at all by the agreement's arbitration provision" and whether the party "agreed to arbitrate disputes of a particular kind"); *Atkinson*

v. *Sinclair Refining Co.*, 370 U.S. 238, 241 (1962) ("whether or not the [party] was bound to arbitrate, as well as what issues it must arbitrate"). A review of the Court's decisions reveals that the Court has considered disputes to concern arbitrability only when they have involved one of two fundamental questions: (1) whether the parties are bound by a valid agreement to arbitrate; and (2) whether the subject matter of the underlying dispute falls within that agreement.

Examples of cases that have involved the question whether the parties are bound by a valid agreement to arbitrate include *First Options*, *John Wiley*, and *Prima Paint*. The arbitrability issue in *First Options* was whether a couple was bound to arbitrate a dispute with a securities clearing firm when only the husband's wholly-owned trading firm and not the couple had signed an arbitration agreement. See 514 U.S. at 940-941. Similarly, the arbitrability issue in *John Wiley* was whether John Wiley was bound by an arbitration agreement to which another corporation, with which John Wiley merged, had agreed before the merger. See 376 U.S. at 546-547.

Prima Paint involved the question whether a consulting agreement that included an arbitration clause had been induced by fraud. 388 U.S. at 402. The Court held that that question should not be decided by the courts, because the fraud was not alleged to have induced the arbitration provision itself but rather the contract as a whole. *Id.* at 403-404. In so holding, however, the Court stated that, if the claim were fraud in the inducement of the arbitration clause itself, then that issue would be resolved by the courts. See *ibid.* See also *Moseley* v. *Electronic & Missile Facilities, Inc.*, 374 U.S. 167 (1963).

Cases that have involved the question whether the subject matter of the underlying dispute is within the arbitration agreement include *AT&T*, *Warrior & Gulf*, and *Atkinson*. In *AT&T*, the arbitrability question was whether the

decision to lay off workers was subject to arbitration or was instead an exercise of management functions that were expressly exempt from arbitration under the agreement. See 475 U.S. at 644-646. Similarly, the arbitrability issue in *Warrior & Gulf* was whether the decision to contract out certain work was subject to arbitration. See 363 U.S. at 583-585. In *Atkinson*, the arbitrability issue was whether, under an arbitration clause that provided for the arbitration of "individual or local employee or local committee grievances," a company was bound to arbitrate its claim for damages against the union for breach of its promise not to strike. See 370 U.S. at 241-243.

Defining arbitrability to include such questions—which involve the fundamental issue whether the parties have agreed to subject themselves to the power of an arbitrator—preserves for the courts the important function of preventing parties who have not consented to arbitration from being forced to submit to it. This Court has been careful, however, not to extend the definition of arbitrability so far that it interferes with the policies underlying the Federal Arbitration Act.

That caution explains why the Court concluded in *Prima Paint* that the question whether there was fraud in the inducement of a business contract that includes an arbitration clause should be decided by the arbitrator even though the question whether the arbitration clause itself was induced by fraud should be decided by the courts. The Court explained that, under the Federal Arbitration Act, a federal court is instructed to order arbitration to proceed once it is satisfied that "the making of the agreement for arbitration or the failure to comply (with the arbitration agreement) is not in issue." 388 U.S. at 403 (quoting 9 U.S.C. 4). The Court also noted that its holding advanced the Federal Arbitration Act's goal of ensuring that "the arbitration procedure, when

selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts." *Id.* at 404.

In a similar vein, the Court has held that courts must guard against ruling on the merits of the underlying claim when deciding whether the parties have agreed to submit a particular grievance to arbitration. *AT&T*, 475 U.S. at 649. If questions of arbitrability required the courts to delve deeply into the facts of the underlying dispute, then preliminary adjudication of arbitrability issues could interfere with "Congress' clear intent, in the Arbitration Act, to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible." *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 22. In light of that concern, the Court has held that even the question whether a claim is so frivolous that it is not subject to arbitration is presumptively for the arbitrator rather than the courts to decide. See *United Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564 (1960).

2. Whether a party to an arbitration agreement has complied with applicable time limits is presumptively an issue for the arbitrator

Similar considerations have led the Court to make clear that, when the subject matter of the underlying dispute between the parties is arbitrable, "the question whether 'procedural' conditions to arbitration have been met" is presumptively for the arbitrator to decide. See *John Wiley*, 376 U.S. at 556-558. The Court's decisions thus establish that questions concerning compliance with contractual exhaustion requirements and time limits, as well as questions about the applicability of extrinsic time limitations such as laches, are *not* issues of arbitrability that the parties are presumed to have intended that the courts would decide.

In *John Wiley*, after holding that whether the obligation to arbitrate survived the merger was an arbitrability issue to be decided by the courts, 376 U.S. at 546-551, the Court

considered "the question of so-called 'procedural arbitrability,'" *id.* at 555. John Wiley contended that it was not required to arbitrate because the union had not invoked the informal grievance procedures that the arbitration agreement imposed as a prerequisite to arbitration. *Id.* at 555-556. The company also contended that the union had not complied with the agreement's requirement that the union provide notice of any grievance within four weeks after its occurrence or latest existence. *Id.* at 556 n.11. The Court held that, "[o]nce it is determined * * * that the parties are obligated to submit the subject matter of a dispute to arbitration, 'procedural' questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator." *Id.* at 557.[5]

The Court reasoned that whether procedural prerequisites apply, whether they have been followed or excused, and whether the unexcused failure to follow them bars arbitration "cannot ordinarily be answered without consideration of the merits of the dispute which is presented for arbitration." 376 U.S. at 557. The Court thought "[i]t would be a curious rule which required that intertwined issues of 'substance' and 'procedure' growing out of a single dispute and raising the same questions on the same facts had to be carved up between two different forums, one deciding after the other."

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[5] The Court did not address whether the parties to an arbitration agreement could, in their agreement, override the rule that the arbitrator, not the courts, decide whether time limits and other procedural preconditions to arbitration have been satisfied. Because arbitration is fundamentally "a matter of contract between the parties," *First Options*, 514 U.S. at 943, there is no reason, as a general matter, to conclude that the parties could not do so, although any doubts about the parties' intent would be resolved in favor of the arbitrator's deciding the time limit issue. See *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24-25. As noted above, however, the NASD rules prohibit customer agreements from restricting or contradicting the rules of any SRO or limiting a customer's right to file a claim in arbitration. See note 3, *supra* (discussing NASD Rule 3110(f)(4)).

Ibid. The Court also noted that "judicial proceedings preliminary to arbitration" present "opportunities for deliberate delay and the possibility of well-intentioned but no less serious delay" occasioned by the separation of the "procedural" and "substantive" elements of a dispute. *Id.* at 558. Indeed, antecedent judicial proceedings not only delay resolution of the underlying dispute but impose increased costs on the parties, a result that is contrary to the very reasons that the parties agreed to arbitration in the first place—to increase the speed and decrease the cost of resolving their disputes. *Ibid.*

Similarly, in *International Union of Operating Engineers* v. *Flair Builders, Inc.*, 406 U.S. 487 (1972), the Court held that whether arbitration was barred by laches was a question for the arbitrator to decide because the agreement called for arbitration of "any difference" between the parties. The Court noted that the court is responsible for determining "whether a union and employer have agreed to arbitration" as well as "the scope of the arbitration clause." *Id.* at 491. Once it was determined, however, that the parties had signed an agreement to arbitrate "any difference," then "a claim that particular grievances are barred by laches is an arbitrable question under the agreement." *Id.* at 491-492.

The Court based its holding in *Flair Builders, Inc.* on the conclusion that the parties had agreed to arbitrate the issue of laches rather than on the principle established in *John Wiley* that, if the subject matter of the underlying dispute is subject to arbitration, ancillary procedural questions should also be decided by the arbitrator. See 406 U.S. at 490-491 (reserving question whether *John Wiley* principle applies only to procedural prerequisites imposed by the arbitration agreement and not to extrinsic limitations). Notably, however, in determining whether the parties had agreed to arbitrate the issue of laches, the Court did not require a

"clear" indication that the parties had so agreed. See *ibid.* The Court thus did not treat the issue of laches as presenting a question of arbitrability that is presumptively for the courts to decide. Cf. *Warrior & Gulf*, 363 U.S. at 583 n.7 (issue of arbitrability is decided by courts absent "clear demonstration" that parties intended the contrary).

In *Moses H. Cone Memorial Hospital*, *supra*, the Court once again confirmed that the presumption "in favor of arbitration" applies "whether the problem at hand is the construction of the contract language itself or an allegation of waiver, *delay*, or a like defense to arbitrability." 460 U.S. at 25 (emphasis added). Among the cases that the Court cited in support of that proposition was a decision by the United States Court of Appeals for the District of Columbia that applied the presumption in favor of arbitration to the question whether the court or the arbitrator should decide if a claim was barred by the statute of limitations. See *id.* at 25 n.31 (citing *Hanes Corp.* v. *Millard*, 531 F.2d 585, 598 (1976)). The D.C. Circuit in *Hanes* had relied both on this Court's decision in *Flair Builders, Inc.*, see 531 F.2d at 599-600, and on two Second Circuit decisions, one that involved the application of a statute of limitations and another that involved the application of a contractual time bar, see *id.* at 598-599 (citing *Reconstruction Fin. Corp.* v. *Harrisons & Crosfield, Ltd.*, 204 F.2d 366, 367, 369, cert. denied, 346 U.S. 854 (1953), and *Office of Supply, Gov't of the Republic of Korea* v. *New York Navigation Co.*, 469 F.2d 377, 380 (1972)).

C. The Presumption That The Arbitrator Is To Decide Whether Claims Were Submitted Within Applicable Time Limits Advances The Purposes Of The Federal Arbitration Act

The presumption that the arbitrator rather than a court is to decide whether a party to an arbitration agreement has satisfied contractual or other time limits not only is sup-

ported by this Court's precedents but also advances the purposes behind the Federal Arbitration Act. See Poser, *supra*, 50 SMU L. Rev. at 279-280, 295, 329-336.

As noted above, the Act's principal purpose is to ensure that arbitration agreements are enforced in accordance with the parties' intent. See p. 11, *supra*. If the parties enter into a valid arbitration agreement that covers the subject matter of their underlying dispute, then the parties "most likely intend and expect that the arbitrator should resolve all issues that arise concerning that subject." *Painewebber Inc.* v. *Elahi*, 87 F.3d 589, 599 (1st Cir. 1996). At the very least, the time limit question "arises when the parties have a contract that provides for arbitration of some issues. In such circumstances, the parties likely gave at least some thought to the scope of arbitration. And given the law's permissive policies in respect to arbitration, * * * one can understand why the law would insist upon clarity before concluding that the parties did *not* want to arbitrate" the time limit question. *First Options*, 514 U.S. at 945 (internal citation omitted).

The presumption that the arbitrator is to decide timeliness issues also prevents the courts from becoming enmeshed in the facts of the underlying dispute that the parties have agreed to arbitrate. See p. 16, *supra*. As the Court recognized in *John Wiley*, it is often difficult to separate timeliness issues from the substance of the parties' underlying dispute. 376 U.S. at 557. The timeliness requirement at issue in this case illustrates the point. To determine whether a claim is timely under NASD Rule 10304, the decision-maker must identify the "occurrence or event" that gives rise to the underlying claim. For example, petitioner purchased her investments in 1986 but did not file her arbitration claim until March 1997. She alleges, however, not only that respondent sold her unsuitable investments and made misrepresentations at the time that she made the investments, but also that respondent provided misinformation about the investments on an ongoing basis until 1994. To the extent petitioner claims that respondent made misrepresentations within six years prior to the date that she requested arbitration and that those misrepresentations caused her to retain the investments, then that claim would be timely, even though the original sale occurred more than six years before petitioner requested arbitration. See *Merrill Lynch, Pierce, Fenner & Smith* v. *Cohen*, 62 F.3d 381, 385 (11th Cir. 1995); *Painewebber Inc.* v. *Hofmann*, 984 F.2d 1372, 1381 (3d Cir. 1993). Thus, a court could not resolve the question whether petitioner complied with NASD Rule 10304 without conducting a detailed inquiry into the nature and extent of petitioner's underlying claims. *E.g.*, *Cohen*, 62 F.3d at 384-385 (remanding for district court to conduct such a factual inquiry); *Hofmann*, 984 F.2d at 1374 (same).

Requiring such an extensive mini-trial before petitioner could proceed to arbitration would ill serve Congress's intent "to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible." *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 22. Instead, it would allow the kind of "delay and obstruction in the courts" that the Federal Arbitration Act was designed to avoid. See *Prima Paint Corp.*, 388 U.S. at 404. Indeed, the "costs and delays involved in resolving eligibility disputes affect the ability of customers (investors) to receive complete recovery on their claims. Under some circumstances, customers (investors) are discouraged or prevented from seeking recovery for their claims because the costs and delays of litigating eligibility * * * approach or exceed the value of their claims." 63 Fed. Reg. 588, 591 (1998) (views of the NASD, reprinted in SEC notice of proposed rulemaking to approve amendment to Rule 10304).

When parties who have signed an agreement to arbitrate are forced to litigate collateral issues before they can pro-

ceed to arbitration, the advantages that arbitration offers over judicial resolution are undermined. "If arbitration is to enable parties to resolve their differences with speed, economy, informality, privacy, and finality, then the ability of arbitrating parties to also resort to the courts must be reduced to a minimum." Poser, *supra*, 50 SMU L. Rev. at 279.

There is no need to permit resort to the courts here. Allowing the arbitrator to decide timeliness issues does not pose a significant risk of "forc[ing] unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide." *First Options*, 514 U.S. at 945. The contention that an arbitration claim was not timely filed is different in character from the contention that a party never consented to arbitration at all or did not consent to arbitration of certain subject matters. The contention is not that the party did not intend an arbitrator to have the power to resolve the underlying dispute but that the claimant, because of the passage of time, can no longer arbitrate a claim that would otherwise be within the scope of the agreement. An arbitrator can appropriately decide that issue without any risk that the arbitration forum is forcing its process upon a non-consenting party. See *John Wiley*, 376 U.S. at 558-559 ("Refusal to order arbitration of subjects which the parties have not agreed to arbitrate does not entail the fractionating of disputes about subjects which the parties do wish to have submitted."); Barbara Black, *Securities Arbitration Is Not Supposed To Be So Complicated: Arbitrability, the Eligibility Rule, And Whose Law Decides* (to be published in *Securities Regulation Law Journal* (Summer 2002)) (copy lodged with Court). Finally, the arbitrator's decision on the time-limit issue is subject to judicial review upon completion of the arbitration to ensure, among other things, that the arbitrator did not exceed his powers or manifestly disregard the law. See note 4, *supra*.

D. NASD Rule 10304's Use Of The Phrase "Eligible For Submission To Arbitration" Does Not Make The Rule's Application A Question Of Arbitrability

Consistent with this Court's decisions and the policies underlying the Federal Arbitration Act, the courts of appeals have almost uniformly held that the arbitrator, rather than a court, is to decide whether claims have been submitted within contractual time limits, at least outside the specific context of the question presented in this case. See *Washington Hosp. Ctr.* v. *Service Employees Int'l Union, Local 722*, 746 F.2d 1503, 1506 (D.C. Cir. 1984); *Local 285, Serv. Employees Int'l Union* v. *Nonotuck Resource Assoc.*, 64 F.3d 735, 739-741 (1st Cir. 1995); *Martens* v. *Thomann*, 273 F.3d 159, 179 n.14 (2d Cir. 2001); *Nursing Home & Hosp. Union No. 434* v. *Sky Vue Terrace, Inc.*, 759 F.2d 1094, 1097 (3d Cir. 1985); *Glass* v. *Kidder Peabody & Co.*, 114 F.3d 446, 455-456 (4th Cir. 1997); *Oil Workers' Int'l Union, Local 4-447* v. *Chevron Chem. Co.*, 815 F.2d 338, 341-343 (5th Cir. 1987); *Armco Employees Indep. Fed.* v. *AK Steel Corp.*, 252 F.3d 854, 858-861 (6th Cir. 2001); *Beer, Local Union No. 744* v. *Metropolitan Distrib., Inc.*, 763 F.2d 300, 303 (7th Cir. 1985); *Automotive Employees Union, Local No. 618* v. *Town & Country Ford, Inc.*, 709 F.2d 509 (8th Cir. 1983); *Local Union No. 370* v. *Morrison-Knudsen Co.*, 786 F.2d 1356 (9th Cir. 1986) (per curiam); *Denhardt* v. *Trailways, Inc.*, 767 F.2d 687 (10th Cir. 1985); *Belke* v. *Merrill Lynch, Pierce, Fenner & Smith*, 693 F.2d 1023, 1027 (11th Cir. 1982).[6]

There is, however, substantial division among the courts of appeals regarding the specific question of who decides

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[6] There have been some divergent decisions within some of the courts of appeals. See *Kennecott Utah Copper Corp.* v. *Becker*, 186 F.3d 1261, 1267-1268 (10th Cir. 1999) (acknowledging the possible existence of a divergent Tenth Circuit opinion); *General Drivers, Local Union 89* v. *Moog Louisville Warehouse*, 852 F.2d 871 (6th Cir. 1988) ("virtually limited to its facts" by *Armco Employees Indep. Fed.*, 252 F.3d at 860).

whether a party has complied with the time limit imposed by NASD Rule 10304 and parallel arbitration rules of other SROs. See *Elahi*, 87 F.3d at 592 (noting a nearly even circuit split). Those courts that have held that NASD Rule 10304 and parallel rules of other SROs should be applied by the courts at the outset have relied almost exclusively on the rules' use of the phrase "eligible for submission to arbitration." The courts reason that, because failure to comply with the time limit bars eligibility for arbitration, the rule is not simply a contractual timeliness requirement, but is instead a substantive or jurisdictional limitation and thus a component of arbitrability.[7]

The fact that Rule 10304 is phrased in terms of whether a claim is "eligible for submission to arbitration" does not mean that it involves the question of arbitrability. The rule, the NASD has explained, originally reflected a judgment that claims that were more than six years old could be unsuitable for arbitration, largely because brokerage firms were not required to maintain records longer than that period of time. See 63 Fed. Reg. at 590. That objective does not support according the rule "arbitrability" status.[8]

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[7] See *Cogswell* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 78 F.3d 474, 476-477, 479 (10th Cir. 1996); *Cohen*, 62 F.3d at 384; *Painewebber Inc.* v. *Hofmann*, 984 F.2d 1372, 1379 (3d Cir. 1993); *Roney & Co.* v. *Kassab*, 981 F.2d 894, 898-899 (6th Cir. 1992); *Edward D. Jones & Co.* v. *Sorrells*, 957 F.2d 509, 512, 514 (7th Cir. 1992).

[8] The NASD has referred to the rule as a "substantive jurisdictional time limitation on the dispute that could be arbitrated." 63 Fed. Reg. at 592. It is unclear what the NASD meant by those terms and what consequences the NASD thought might flow from that characterization. As explained in the text above, however, this Court's decisions indicate that the arbitrator rather than the courts should apply the rule. Nor could the NASD have meant to suggest differently, because it had expressly stated that the rule "does not specify the party responsible for determining whether 6 years have elapsed from the occurrence or event giving rise to the matter." 59 Fed. Reg. 39,373, 39,374 (1994) (NASD description of the rule reprinted in earlier SEC notice of proposed rulemaking).

Nor is the language of the rule substantially different from the language of the notification provision in *John Wiley*, which this Court held was to be applied by the arbitrator. That notification provision stated that "[t]he failure of either party to file the grievance within this time limitation shall be construed and be deemed to be an abandonment of the grievance." 376 U.S. at 556 n.11. NASD Rule 10304 could easily have been phrased using similar language, so that the failure to bring a claim within six years would be "deemed to be an abandonment of" the right to seek arbitration. That change in language would not alter the operative effect of the rule, and it should likewise make no difference regarding whether the arbitrator or a court applies the rule in the first instance.

Similarly, the policy considerations that support the Court's decision in *John Wiley* still apply however Rule 10304 is phrased. Even though the rule uses the words "eligible for submission to arbitration," the parties likely intended that the arbitrator would decide the timeliness of claims that otherwise would be subject to arbitration, particularly because the timeliness decision often requires a detailed understanding and factual assessment of the underlying claims. Moreover, lengthy judicial proceedings prior to arbitration would still deprive parties whose claims are found to meet the timeliness requirement of the speedy, less costly dispute resolution that they bargained for in the arbitration agreement. See pp. 17-18, 20-22, *supra*.

Some courts that have held that Rule 10304 should be applied by the courts have also suggested that the word "eligible" differs in an important way from the language of statutes of limitations, which the courts agree should be applied by the arbitrator. See *Painewebber Inc.* v. *Hofmann*, 984 F.2d 1372, 1378 (3d Cir. 1993) (quoting *Paine-*

webber Inc. v. *Hartmann*, 921 F.2d 507, 513-514 (3d Cir. 1990)); *Roney*, 981 F.2d at 899 (also agreeing with *Hartmann*); see also p. 19, *supra*. There is, however, no meaningful difference, for purposes of deciding whether Rule 10304 presents an issue of arbitrability, between the language of the rule and the language of statutes of limitations. For example, the statute of limitations adopted by the Court for private actions under Section 10(b) of the Exchange Act, 15 U.S.C. 78j(b), provides that "[n]o action shall be maintained to enforce any liability * * * unless brought within one year after the discovery of the facts constituting the violation and within three years after such violation." 15 U.S.C. 78i(e); see *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350, 364 n.9 (1991). Given that Rule 10304 would be applied by the arbitrator if it provided that no arbitration claims over six years old "shall be maintained," then it should likewise be applied by the arbitrator even though it provides instead that no such claims "shall be eligible for submission to arbitration." Whether the rule is applied by the courts or by the arbitrator should not turn on subtleties in the rule's language that were never intended to bear such weight.

There are distinctions between a statute of limitations and Rule 10304. For example, a claim can be barred by a statute of limitations and yet satisfy the time limit imposed by the rule, or vice versa. See 63 Fed. Reg. at 594 (views of the NASD). In addition, a statute of limitations affects a party's right to recover in any forum, but Rule 10304 provides only that certain claims are not eligible for "arbitration under [the NASD] Code." NASD Rule 10304. Despite those differences, statutes of limitations and Rule 10304 both impose timing requirements on claims, and there is no persuasive reason why statutes of limitations should be applied by the arbitrator but Rule 10304 should not. Indeed, because Rule 10304 is essentially a forum-specific limitations provision, it

is especially appropriate that it should be applied by the forum created by the very rules that impose the limitation, rather than by the courts.

E. The Parties To This Case Agreed That The Arbitrator Would Decide Whether Claims Are Barred By The Time Limit In NASD Rule 10304

For the reasons stated above, NASD Rule 10304, like other time limitations, does not involve a question of arbitrability. Therefore, the court of appeals erred in presuming that the parties intended the courts to decide whether petitioner's claims are barred by the rule. See Pet. App. 16-19, 24-25. Instead, the court of appeals should have applied ordinary state law contract principles, supplemented by the general federal law presumption that parties to a valid arbitration agreement intend the arbitrators to decide disputed issues. See pp. 10-12, *supra*. When the parties' agreement is considered under that analytical framework, it is clear that the arbitrator, not the courts, is to decide whether petitioner's claims are time barred under Rule 10304.

Because the agreement contains a choice-of-law clause providing for application of New York law, see 1992 Agreement ¶ 18, interpretation of the agreement begins with application of the substantive rules of the New York state law of contracts. See *Elahi*, 87 F.3d at 600; *Painewebber Inc.* v. *Bybyk*, 81 F.3d 1193, 1198-1199 (2d Cir. 1996); see generally *Mastrobuono*, 514 U.S. at 63-64 (interpreting similar choice-of-law clause to require application of the "substantive principles that New York courts would apply, but not to include special rules limiting the authority of arbitrators").

Under New York law, a court "enforce[s] the plain meaning of th[e] agreement" between the parties. *Bybyk*, 81 F.3d at 1199 (citing New York law); accord *Elahi*, 87 F.3d at 600 (same). The basic arbitration clause in the parties' agreement provides that the parties will arbitrate "all controver-

sies between [them] * * * concerning or arising from (i) any account maintained with [respondent] by [petitioner]; (ii) any transaction involving [respondent and petitioner], * * * or (iii) the construction, performance or breach of this or any other agreement between [respondent and petitioner]." 1992 Agreement ¶ 19. The plain meaning of that provision is that the parties will arbitrate "all" disputes arising from petitioner's securities accounts with respondent, including whether petitioner's request for arbitration by the NASD of her claim that respondent breached its fiduciary duty was timely filed. The word "all" encompasses disputes over whether an underlying claim concerning the account is timely. Cf. *Flair Builders, Inc.*, 406 U.S. at 491-492. Any doubt on that point is eliminated by the express provision that disputes about the "construction" and "performance" of the arbitration agreement or any other agreement between the parties are themselves subject to arbitration. See *Bybyk*, 81 F.3d at 1199; *Smith Barney Shearson, Inc.* v. *Sacharow*, 91 N.Y.2d 39, 46 (1997). Moreover, any ambiguity in the scope of the clause must be construed against respondent, which drafted the agreement. See *Mastrobuono*, 514 U.S. at 63 (citing New York law).

Consideration of other terms of the agreement reinforces that reading of the basic arbitration clause. See *Mastrobuono*, 514 U.S. at 63 (under New York law, agreement is "read to give effect to all its provisions and to render them consistent with each other"). The 1992 Agreement authorizes petitioner to select the arbitral forum, 1992 Agreement ¶ 19, and her selection of the NASD makes applicable the NASD Code, 1997 Agreement ¶ 1. The NASD Code, in turn, includes not only the time limit in NASD Rule 10304 but also NASD Rule 10324, which provides that the "arbitrators shall be empowered to interpret and determine the applicability of all provisions under [the NASD Code.]" Because Rule 10304 is a provision of the NASD Code, the clear import of

Rule 10324 is that arbitrators are empowered to determine whether a claim complies with Rule 10304. See 67 Fed. Reg. at 19,466 n.11 (expressing SEC's view to that effect); *Bybyk*, 81 F.3d at 1202; *FSC Sec. Corp.* v. *Freel*, 14 F.3d 1310, 1312-1313 (8th Cir. 1994); *Sacharow*, 91 N.Y.2d at 46-47.

Thus, interpreted under ordinary principles of contract law, the parties' agreement provides that the arbitrator is to decide whether petitioner's claims were filed within the time limit in NASD Rule 10304. The federal law presumption that parties to a valid arbitration agreement intend for the arbitrator to resolve their disputes only reinforces that conclusion. Indeed, even if the contrary presumption that governs arbitrability issues applied, Rule 10324 would provide the necessary "clear and unmistakable" evidence that the parties intended for the arbitrator to apply Rule 10304 in the first instance. See *Bybyk*, 81 F.3d at 1202; *Freel*, 14 F.3d at 1312-1313; *Sacharow*, 91 N.Y.2d at 46-47.

Some courts that have rejected reliance on Rule 10324 have found it insufficiently clear because it does not expressly address arbitrability. *Jones*, 957 F.2d at 514 n.6. Other courts have relied on the principle of contract interpretation that a specific provision controls over a conflicting more general provision, and have reasoned that the specific provision in Rule 10304 trumps the general delegation of authority to the arbitrator in Rule 10324. *Cogswell*, 78 F.3d at 480; *Cohen*, 62 F.3d at 384. Those arguments are unpersuasive. Rule 10324 gives the arbitrator authority to interpret and apply *all* provisions of the NASD Code, one of which is the time limit in Rule 10304. Because both Rule 10324 and Rule 10304 appear in the NASD Code, a party reading the Code could have no doubt that arbitrators are empowered to interpret and apply the time limit. Furthermore, the principle that a specific provision controls over a conflicting more general provision is not applicable here, because there is no conflict between Rule 10304 and Rule

10324. Rule 10304 only imposes a time limit; it does not speak to the question which decision-maker—the arbitrator or a court—is to apply the time limit to determine whether a claim has been timely submitted. Rule 10324 addresses that question, by providing that the arbitrator has the authority to apply *all* provisions of the NASD Code, including the time limit in Rule 10304.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

KAREN HOWSAM, individually and as Trustee for the E. Richard Howsam, Jr. Irrevocable Life Insurance Trust dated May 14, 1982,

Petitioner,

v.

DEAN WITTER REYNOLDS, INC.,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

BRIEF FOR THE SECURITIES INDUSTRY ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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39 pp

QUESTION PRESENTED

Whether the Tenth Circuit properly applied *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), in ruling that courts, not arbitrators, ordinarily must make threshold determinations of eligibility for arbitration pursuant to Section 10304 of the National Association of Securities Dealers Code of Arbitration Procedure, and that federal law governs determinations of whether the parties clearly and unmistakably agreed to arbitrate the question of eligibility.

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IN THE

Supreme Court of the United States

No. 01-800

KAREN HOWSAM, individually and as Trustee for the E. Richard Howsam, Jr. Irrevocable Life Insurance Trust dated May 14, 1982,

Petitioner,

v.

DEAN WITTER REYNOLDS, INC.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF FOR THE SECURITIES INDUSTRY ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF AMICUS CURIAE[1]

The Securities Industry Association ("SIA") is the principal trade association of the securities industry, bringing together the shared interests of more than 600 securities firms to accomplish common goals. The SIA member-firms (in-

[1] Pursuant to this Court's Rule 37.6, *amicus* Securities Industry Association states that no counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus*, its members, or its counsel made a monetary contribution to the preparation or submission of the brief. Counsel of record for all parties have consented to the filing of this brief in letters that have been lodged with the Clerk.

cluding investment banks, broker-dealers, and mutual fund companies) are active in all United States and foreign markets and in all phases of corporate and public finance. The United States securities industry manages the accounts of approximately 50 million investors directly and tens of millions of investors indirectly through corporate, thrift, and pension plans. The industry generates in excess of $300 billion in revenues yearly in the United States.

Perhaps more so than any other industry in the United States, the securities industry relies upon arbitration to resolve customer disputes. As a member of the Securities Industry Conference on Arbitration ("SICA"), the SIA has been intimately involved in the evolution of the arbitration process, most notably with respect to customer-broker disputes arising from securities transactions.

This case involves the proper interpretation of a section of the National Association of Securities Dealers ("NASD") Code of Arbitration Procedure governing eligibility for arbitration before the NASD, and whether federal courts properly may resolve the threshold question of eligibility by applying federal arbitration law. The NASD is the largest securities-industry self-regulatory organization in the world. Its subsidiary, NASD Dispute Resolution, Inc., handles over 90 percent of all securities-related disputes through arbitration or mediation.

It is critically important to the SIA that member firms not be forced to arbitrate disputes they did not agree to arbitrate, including stale disputes ineligible for arbitration under NASD rules. It is equally important that there be uniformity in the application of the NASD eligibility rule. Significantly, the vast majority of SIA members have nationwide operations, and a patchwork of rules would undermine the Congressional policy favoring national markets. The SIA therefore has a vital interest in the correct resolution of this case.

STATEMENT

The NASD has adopted a comprehensive Code of Arbitration Procedure (the "NASD Code") governing dispute resolution for those who choose to arbitrate before the NASD. Provisions of the NASD Code are deemed a part of and incorporated by reference into every agreement to arbitrate under NASD rules. *See* NASD Code § 10331, NASD Manual (CCH) ¶ 7601.

The NASD Code, which was approved by the Securities and Exchange Commission ("SEC") after public notice and opportunity for comment, includes an eligibility provision governing the time within which disputes must be submitted to arbitration:

> 10304. Time Limitation Upon Submission
>
> No dispute, claim, or controversy shall be eligible for submission to arbitration under this Code where six (6) years have elapsed from the occurrence or event giving rise to the act or dispute, claim, or controversy. This Rule shall not extend applicable statutes of limitations, nor shall it apply to any case which is directed to arbitration by a court of competent jurisdiction.

NASD Manual (CCH) ¶ 7574. *See generally* NASD Notice to Members 80-34, 1980 NASD LEXIS 312 (July 17, 1980) (noting NASD had received approval from the SEC of a "thorough revision to its Code of Arbitration Procedure"); NASD Notice to Members 71-23, 1971 NASD LEXIS 23 (July 23, 1971) (publishing proposed amendments to NASD Code of Arbitration Procedure for comment by NASD members and noting that all proposals must be "submitted to and not disapproved by" the SEC before becoming effective).

The NASD Code formed the basis of the Uniform Code of Arbitration formulated by the SICA, an advisory body

which included public representatives. *See* NASD Notice to Members No. 80-34, *supra*. The Uniform Code of Arbitration, and the eligibility rule it included, were adopted in full by other self-regulatory organizations. *Id.* Consequently, the New York Stock Exchange and the American Stock Exchange each have eligibility rules identical to the NASD rule. New York Stock Exchange Arbitration Rules, New York Stock Exchange Guide (CCH) ¶ 2603 (Arbitration Rule 603); American Stock Exchange Guide (CCH) ¶ 9544 (Arbitration Rule 605).

As a client of Dean Witter Reynolds, Inc. ("Dean Witter"), Petitioner Howsam entered into a standard customer service agreement ("1992 Agreement") that contained an arbitration clause requiring the parties to arbitrate "all controversies . . . concerning or arising from" Dean Witter's account-related services. In March 1997, Petitioner commenced an arbitration proceeding before the NASD pertaining to advice and investment recommendations allegedly made by Dean Witter in March and April 1986. Petitioner executed a Submission Agreement stating that she agreed to abide by "the Constitution, By-Laws, Rules, Regulations, and/or Code of Arbitration Procedure of the sponsoring organization," i.e. the NASD.

In July 1997, Dean Witter filed a complaint in the United States District Court for the District of Colorado, seeking (*inter alia*) a declaration that Petitioner's claims were ineligible for arbitration under Section 10304. Petitioner moved to dismiss the complaint for lack of jurisdiction, asserting that the district court could not decide the issue of eligibility under Section 10304 because the 1992 Agreement required Dean Witter to arbitrate "all controversies . . . concerning or arising from" Dean Witter's account-related services. Petitioner further argued that only an arbitrator could decide the eligibility issue because the 1992 Agreement contained a choice of law provision selecting New York state law as gov-

erning, and because the New York Court of Appeals, applying Second Circuit case law, had ruled in 1997 that parties who agree to arbitrate "all controversies" must also arbitrate disputes regarding eligibility under Section 10304.

The District Court granted Petitioner's motion, concluding that under New York decisional law, the 1992 Agreement provided "clear and unmistakable evidence" that the parties intended to submit all issues, including the issue of eligibility, to the NASD arbitrators.

The Court of Appeals for the Tenth Circuit reversed. The Court of Appeals first ruled that federal law governed the determination of whether the parties had "clearly and unmistakably" agreed to arbitrate the question of eligibility, because the Federal Arbitration Act ("FAA") created a substantive body of federal law governing arbitrability, and the parties' general choice-of-law clause did not require the court to apply New York law on arbitrability. Then, applying federal arbitration law, rather than New York law, the Court of Appeals concluded that Section 10304 raised a threshold question of arbitrability, and that there was not "clear and unmistakable" evidence that the parties had agreed to arbitrate that question. Accordingly, the Court of Appeals concluded that the question of eligibility could be resolved by the court, and remanded to the District Court for further proceedings.

Petitioner sought review, asking this Court to resolve whether, given the arbitration agreement between the parties in this case, the eligibility question should be decided by a court or by the arbitrators.

SUMMARY OF ARGUMENT

The Court of Appeals properly determined that the eligibility rule of Section 10304 raises a threshold question of arbitrability that ordinarily must be decided by courts, not arbitrators. The text, history and purpose of the rule reveal that the eligibility provision operates as a bright-line contractual

limitation on the disputes the parties agreed to submit to arbitration before any dispute arose, rather than a rule that varies in its application based on the conduct of the parties after a dispute arises. Pursuant to this Court's ruling in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), the threshold question of eligibility therefore must be resolved by courts, not arbitrators, unless the parties "clearly and unmistakably" agree otherwise.

It is vitally important that arbitrators not make eligibility determinations unless the parties have clearly and unmistakably agreed to arbitrate that issue. The eligibility rule is an integral part of the parties' arbitration agreements and defines arbitral jurisdiction. Parties who agree to arbitrate waive certain rights and protections attendant to litigation in court, including the right to judicial review of incorrect determinations on matters of law. Contractual limitations on the scope of that waiver must be honored.

On a practical level, requiring arbitrators to make eligibility determinations substantially undermines the effectiveness of the eligibility rule. Because the NASD arbitration rules do not emphasize summary resolution of disputes based on prehearing motions, arbitrators faced with a dispute regarding whether the six-year eligibility period has elapsed often defer resolving that dispute until the end of the arbitration proceedings, after they have heard all other issues in the case. *See* Notice of Filing of Proposed Rule Change by NASD Relating to the Eligibility of Claims for Arbitration, 63 Fed. Reg. 588, 590 (Jan. 6, 1998) (noting that arbitrators "tend to delay eligibility decisions until the hearing on the merits"). Parties are often thus forced to spend time and money arbitrating the substantive merits of ineligible, stale claims that they did not agree to arbitrate, after memories have faded and other evidence has been lost. In addition, because arbitrators are not required to detail the reasons for their decisions, it is often impossible to determine whether an award impermissibly

permits recovery for an ineligible claim, and therefore impossible to obtain effective review of incorrect eligibility determinations.

The eligibility rule represents a fair contractual limitation on the age of disputes that may be arbitrated. The rule was adopted by the NASD, embraced by the SICA – an advisory body that (like the NASD Board of Governors) includes public representatives – and approved by the SEC. The eligibility rule thus represents the collective judgment of industry and non-industry representatives alike that six years strikes a proper balance between claims that may and claims that may not be allowed to proceed to arbitration. Indeed, Petitioner acknowledges that the six-year eligibility period is tied to the length of time the SEC requires broker-dealers to retain their records. The limitation therefore guards against the pursuit of claims in arbitration when the underlying records may no longer exist.

Finally, the Court of Appeals properly concluded that federal law governs whether or not there exists "clear and unmistakable" evidence of an intent to arbitrate the eligibility issue. The FAA created a substantive body of federal arbitration law in order to ensure uniform enforcement of agreements to arbitrate. It is vital that the securities industry, which is national in scope, have uniformity and certainty in how its standard arbitration agreements are interpreted, so that members are not forced to arbitrate stale claims they rightfully believed were no longer eligible for arbitration. Although ordinary questions of fact regarding contract interpretation may be resolved by turning to state law, the question of whether the parties "clearly and unmistakably" expressed an intent to arbitrate the arbitrability question is properly a matter of federal law. General choice-of-law clauses do not provide sufficient evidence of the requisite intent to arbitrate eligibility. Any other conclusion would undermine the purposes of the FAA by reversing the estab-

lished presumption against arbitrating threshold questions of arbitrability, thereby forcing parties to arbitrate disputes they did not contractually agree to arbitrate.

ARGUMENT

A. Under *First Options*, Arbitrators May Not Resolve Disputes Regarding Eligibility Absent "Clear And Unmistakable" Evidence That The Parties Intended To Arbitrate Those Disputes

The core legal principles underlying this case are well established. This Court has long acknowledged that "[a]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *AT&T Techs., Inc. v. Communications Workers of America*, 475 U.S. 643, 648 (1986) (citations and internal quotations omitted). *See also* Petitioner's Brief at 6 ("Parties are not required to arbitrate unless they have agreed to do so."). In *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943-44 (1995), this Court applied that fundamental principle in ruling that because issues of arbitrability affect the contractually-conferred jurisdiction of the arbitral forum, those issues will not be submitted to arbitration unless the parties have "clearly and unmistakably" manifested their intent to arbitrate them.

First Options involved an attempt by a stock trade clearing firm (First Options) to arbitrate a dispute that had arisen with two individuals (Mr. and Mrs. Kaplan) and Mr. Kaplan's wholly-owned company (MKI). *Id.* at 940. Of the three parties against whom arbitration was sought, only MKI had signed a document containing an arbitration clause. *Id.* at 941. The individuals denied that their dispute with First Options was arbitrable, and filed written objections to that effect with the arbitration panel. Although they objected to the authority of the arbitrators, the individuals proceeded with the arbitration. *Id.* at 946-47. The arbitrators concluded that they had the authority to rule on the merits of the dispute, and entered an award in favor of First Options. *Id.* at 941. The federal district court confirmed that award, rejecting the individuals' request that the district court vacate the award pursuant to 9 U.S.C. § 10 on the grounds that the arbitrators had exceeded their authority. *Id.* On appeal, the Third Circuit reversed, agreeing with the individuals that the dispute was not arbitrable against them. *Id.*

This Court granted certiorari. *Id.* In affirming the decision of the Third Circuit, and in accordance with long-standing precedent, the Court recognized that the answer to who must resolve questions of arbitrability depends on what the parties agreed about that particular question, because "a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration." *Id.* at 945. If the parties agreed to allow an arbitrator to resolve arbitrability, then the court must defer to the arbitrator's rulings on that matter. If the parties did not so agree, the courts shall review the issue de novo. *Id.* at 943.

The Court cautioned, however, that state law principles governing contract interpretation are modified by the "important qualification" that "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clear and unmistakable' evidence that they did so." *Id.* at 944. Heightened evidence of intent to arbitrate questions of arbitrability is necessary because parties to an arbitration agreement "often might not focus upon" the question of who should decide questions of arbitrability, "or upon the significance of having arbitrators decide the scope of their own powers." *Id.* at 945.

First Options thus makes clear that the law treats silence or ambiguity regarding who decides arbitrability differently from the way it treats silence or ambiguity regarding whether the parties agreed to arbitrate a particular merits-related dispute. *Id.* at 944-45. Whereas silence on a dispute related to the merits of a claim or the procedure to be applied by the

arbitrator to resolve the claim gives rise to a presumption of arbitrability, silence on the question of who decides whether the parties have agreed to arbitrate the dispute does not. This presumption against arbitrating the question of arbitrability is necessary lest courts "too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide." *Id.* at 945.

Because Section 10304 raises a question of arbitrability, the construction and application of that eligibility provision in any particular case cannot be arbitrated absent "clear and unmistakable" evidence that the parties agreed to arbitrate it.

1. The NASD Eligibility Rule Contractually Limits The Disputes The Parties Agreed To Arbitrate, And Thus Raises An Issue Of Arbitrability That Arbitrators Ordinarily Should Not Resolve

The NASD eligibility rule is incorporated by reference into every agreement to arbitrate before the NASD. *See* NASD Code § 10331, NASD Manual (CCH) ¶ 7601. Contrary to the assertions made by Petitioner and by *amicus* SEC, the rule therefore does not function as an ordinary procedural limitation on the timeliness of a party's claim after the claim accrues, or a party's ability to prosecute the claim once it is submitted to arbitration. Instead, it operates as a contractual limitation on an arbitrator's power to consider the claim at all. The history and language of the NASD eligibility rule confirm the fundamental difference between determinations regarding eligibility and determinations regarding compliance with applicable statutes of limitation.[2]

---

[2] The eligibility rule's function as a contractual limitation on the parties' agreement to arbitrate undermines Petitioner's argument that Section 10304 presents a mere "procedural" issue of timeliness that arbitrators ordinarily must resolve. *See* Petitioner's Brief at 25-29. In any event, use of labels such as "procedural"

[Footnote continued on next page]

The securities industry has long depended on arbitration as a cost-effective, efficient means of resolving disputes. *See generally* General Accounting Office, "Securities Arbitration: How Investors Fare," GAO Report GAO/GGD 92-74, at 4, 6, 7, 35 (May 1992) ("1992 GAO Report") (concluding that there is no evidence of bias against investors in industry-sponsored arbitration fora); *see also* Emil Bukhman, *Time Limits on Arbitrability of Securities Industry Disputes Under the Arbitration Rules of Self-Regulatory Organizations*, 61 Brook. L. Rev. 143 (1995). The New York Stock Exchange, for example, was arbitrating disputes as long ago as 1872. *See* 1992 GAO Report, at 18; *Bukhman* at 146 & n.13.

Arbitration has, on the whole, been highly salutary and has often been used as an efficient and fair way to resolve disputes between brokerage firms, between firms and their employees, and also between firms and their institutional and individual investors. *See, e.g.*, NASD Code § 10101, NASD Manual (CCH) ¶ 7511 (setting forth matters that may be arbitrated before the NASD); *see also* 1992 GAO Report.

Notwithstanding its substantial benefits, the arbitration process has certain inherent limitations. Whereas arbitration works well in resolving factual disputes in specialized subject-matter areas or arising in specific industries, it does not function as well in resolving issues of law. The streamlined process of arbitration typically does not emphasize summary resolution of disputes on the basis of dispositive pre-hearing motions. *See* NASD Code § 10321, NASD Manual (CCH) ¶ 7584-85 (setting forth provisions governing pre-hearing proceedings and stating that unresolved pre-hearing issues

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arbitrability and "substantive" arbitrability does not determine who should resolve the issue. Either the parties clearly and unmistakably agreed to allow the arbitrator to resolve questions regarding arbitrability, or they did not. *See First Options*, 514 U.S. 938.

may be referred to the full panel for resolution); New York Stock Exchange Rule 619(d) (same); American Stock Exchange Rule 607(d) (same). In addition, arbitrators are not required to provide the reasons for their decision (*see* NASD Code § 10330(e), NASD Manual (CCH) ¶ 7587; New York Stock Exchange Rule 627(e); American Stock Exchange Rule 618(e)), and their awards are not subject to judicial review for ordinary errors of law. *See* 9 U.S.C. § 10 (grounds for vacatur).

These inherent limitations have presented difficulties in preventing the arbitration of stale claims. For nearly a century, the only restrictions on the age of cognizable disputes were the underlying statutes of limitations. *See* 6 Securities Arbitration Commentator ("SAC") No. 8, at 10 (September 1994) (excerpts of letter from the late William J. Fitzpatrick to SEC discussing history of eligibility rule in connection with proposed amendment to that rule[3]). But because factors to be considered in applying statutes of limitations (factors such as equitable doctrines of tolling, estoppel, and waiver) tended to be considered in connection with evaluating the substantive merits of the case, and because arbitrators did not always apply statutes of limitations properly, respondents in arbitration proceedings often found themselves forced to arbitrate claims that were up to 20 years old, long after records were lost or destroyed, memories faded, and in some cases after the principals to the arbitration had died. *Id.* The benefits of choosing arbitration were diminishing as respondents were being forced to spend time and money arbitrating stale claims while awaiting the arbitrator's determination on timeliness.

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[3] Mr. Fitzpatrick was former General Counsel of the SIA, served as a representative on SICA, and therefore was involved in and familiar with the development of the eligibility rule.

The NASD acted to counteract this considerable threat to the efficiency and fairness of the arbitration process at the time that it created its own dispute resolution forum in 1968. *Id.* As the NASD later explained, "the securities industry believed that the inherently equitable nature of arbitration posed a greater risk that arbitrators might not strictly apply legal defenses," thereby permitting recovery in cases that should never have been heard at all. Notice of Filing of Proposed Rule Change by NASD Relating to the Eligibility of Claims for Arbitration, 63 Fed. Reg. 588, 590 (Jan. 6, 1998). Consequently, the NASD included an eligibility rule as part of its first arbitration code. *See* 6 SAC No. 8, at 10.[4]

The text of the eligibility rule confirms what is already evident from its history and purpose: that the rule does not operate as a run-of-the-mill statute of limitations providing a defense on the merits of a claim, but rather defines contractually the limits on the availability of the arbitral forum itself. The rule refers not to timeliness of claims, but to "eligibility" for submission to arbitration:

> No dispute, claim or controversy shall be *eligible for submission to arbitration* under this Code in any instance where six (6) years have elapsed from the occurrence or event giving rise to the act or the dispute, claim or controversy.

NASD Code § 10304, NASD Manual (CCH) ¶ 7574 (emphasis added).[5] By its plain terms, Section 10304 thus deems

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[4] Petitioner concedes that the rule was designed to "prevent stale claims from going to arbitration." Petitioner's Brief at 15.

[5] The rule further states that the eligibility period does not "extend applicable statutes of limitations," thereby confirming the distinction between threshold eligibility determinations and deter-

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claims more than six years old to be ineligible for submission to arbitration in the first instance. *See, e.g., PaineWebber Inc. v. Hartmann*, 921 F.2d 507, 513 (3d Cir. 1990) (analyzing definitions of "eligible" and "submission" to conclude that NYSE eligibility rule bars access to arbitration).

Because the eligibility rule thus contractually limits the scope of an arbitrator's authority to hear a dispute, determinations regarding eligibility, unlike determinations regarding compliance with statutes of limitations, do not depend on equitable factors such as the conduct of the respective parties after a dispute arises, nor on questions of who was at fault for the passage of time between the accrual of a cause of action and the date a claim was filed. *See, e.g., Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cohen*, 62 F.3d 381 (11th Cir. 1995) (NASD eligibility rule not subject to equitable tolling); *see also Ohio Co. v. Nemecek*, 98 F.3d 234 (6th Cir. 1996) (NYSE eligibility time period not subject to equitable tolling); SEC Exchange Act Release No. 34,442, 59 Fed. Reg. 39,373 (Aug. 2, 1994) (noting in connection with proposed amendment to eligibility rule that tolling "historically" is not applicable to that rule); Bukhman, *supra*, 61 Brook. L.

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minations based on the underlying applicable statutes of limitations. NASD Manual (CCH) ¶ 7574; *see also* SEC Release No. 34-39487, *supra*, 63 Fed. Reg. at 594 (commenting in connection with proposed amendments that there exists a "difference between eligibility and statutes of limitation, a distinction that has occasionally been overlooked by courts, arbitrators and other participants"). The NASD Arbitrator's Manual similarly confirms that determinations of eligibility under Section 10304 are separate and apart from determinations of timeliness under applicable statutes of limitations. *See, e.g.*, NASD Arbitrator's Manual, at 11 ("The arbitrators should also be aware that a statute of limitations may preclude the awarding of damages even though the claim is eligible for submission to arbitration.").

Rev. at 188, 196 (concluding that equitable doctrines such as tolling do not apply to the eligibility rule).

Instead, eligibility determinations hinge on a single, objective factor: how much time elapsed from the date of the underlying dispute, claim or controversy to the date that dispute, claim or controversy was submitted to arbitration.[6] The bright-line eligibility provision thus functions as an essential filter, protecting the integrity and fairness of the arbitration process by eliminating stale claims at the outset. Differences in who ordinarily should determine eligibility for arbitration versus who ordinarily should determine timeliness under statutes of limitations flow naturally from the different purposes to be served by and the different factors to consider in applying the two separate limitations. The responsibility for making determinations of eligibility properly falls to courts, not arbitrators, unless the parties clearly and unmistakably agree otherwise.[7]

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[6] Because eligibility determinations thus do not depend on interpretation or application of the parties' agreement regarding their commercial obligations, this Court's ruling in *John Wiley & Sons v. Livingston*, 376 U.S. 543 (1964) is not dispositive. The question in *John Wiley* was not whether a claim fell outside the scope of the agreement to arbitrate because of the passage of time, but rather whether the claimant had waived its right to arbitrate a grievance by failing to follow certain specific contractual steps. The opinion in *John Wiley* does not stray from the fundamental premise that parties cannot be forced to arbitrate beyond the bounds of their agreement. *See id.* at 547 ("[C]ompulsory submission to arbitration cannot precede judicial determination that the [parties'] agreement does in fact create such a duty.")

[7] In fact, Section 10304 states that it would not apply to "any case which is directed to arbitration by a court of competent jurisdiction," thereby preserving the ability of courts to make binding eligibility determinations.

2. The Six-Year Eligibility Rule Represents A Fair And Appropriate Limitation On The Age Of Arbitrable Disputes

Notwithstanding Petitioner's suggestion to the contrary (*see* Petitioner's Brief at 8, 14-16), both the concept of an eligibility rule and its six-year duration were the product of a collaborative effort between the securities industry and the public. The rule represents an abundantly fair limitation on the age of arbitrable disputes. Significantly, the eligibility rule applies to *all* disputes before the NASD, including disputes between members, disputes between members and their employees, and disputes between members and large, sophisticated institutional customers, not only to disputes between members and individual customers. *See* NASD Manual (CCH) ¶ 7511-12 (NASD Code § 10101); *id.* ¶ 7574 (NASD Code § 10304).

As noted above, the eligibility rule first emerged as part of the Code of Arbitration Procedure adopted by the NASD in 1968. Before it became effective, the Code was adopted by the NASD Board of Governors. *See generally* NASD Manual (CCH) ¶ 1101 ("The NASD shall have ultimate responsibility for the rules and regulations of the Association and its operation and administration."). The majority of the governors on the NASD Board of Governors are from outside the securities industry. *See* NASD Manual (CCH) ¶ 151; *see also* NASD By-Laws, Art. VII, § 4(a).

The NASD, like all other self-regulatory organizations, is subject to oversight by the SEC, including review and approval by the SEC of any rules or rule changes proposed by the NASD. *See, e.g.*, 15 U.S.C. § 78s(b)(1); *see also* NASD Notice to Members 80-34, *supra* (noting that the SEC had approved a "thorough revision to [the NASD] Code of Arbitration Procedure" in order to make NASD arbitration procedures uniform with those of other self-regulatory organizations); 1971 NASD LEXIS 23 (July 23, 1971) (noting that

proposed amendments to by-laws and Code of Arbitration Procedure would have to be submitted to and not disapproved by the SEC before becoming effective); *see generally* General Accounting Office, "Securities and Futures: How the Markets Developed and How They Are Regulated," GAO Report GAO/GGD 86-26, at 39 (May 15, 1986) (SEC provides oversight of SROs by, among other things, reviewing and approving SRO rules and rule changes); *see also id.* at 40 (describing process for review and approval, noting rules are first approved by governing body of the SRO itself, and then by the SEC); 1992 GAO Report, at 14 (noting that SEC approves SRO rules and inspects SRO operations, including arbitration).

The eligibility rule exemplifies the extent of public involvement in shaping the rulemaking process. The SICA was formed in 1977, at the instance of the SEC, to review then-existing procedures in place for arbitration before self-regulatory organizations. *See* 1992 GAO Report, at 15. The SICA consisted, and still consists, of not only industry representatives, but also of members of the general public. *Id.* After lengthy negotiations and examination of existing procedures, SICA proposed its Uniform Code of Arbitration, which included the NASD eligibility rule. *Id.* at 15, 20; *see also* 63 Fed. Reg. at 590. All self-regulatory organizations – such as the New York Stock Exchange and the American Stock Exchange – adopted the Uniform Code in the late 1980s, and since then, all have had the same eligibility bar on disputes that may be submitted to arbitration. *Id.*

This process of public scrutiny has resulted in an eligibility rule which strikes a fair balance between the rights of a potential claimant to pursue a claim and the rights of a potential respondent to be free from any obligation to defend against stale claims. Indeed, as the result of the collaborative process, the NASD eligibility rule, originally set at a two-year bar, was amended and extended because the two-year

period was too short. *See* 6 SAC No. 8, at 10 (printing excerpts of letter from William J. Fitzpatrick to the SEC). The current six-year period was chosen because it conforms to the length of time the SEC requires broker-dealers to keep records of certain transactions. *Id.*; *see also* Petitioner's Brief at 15; 17 C.F.R. § 240.17a-4 (most records need only be kept for three years or six years, depending on the type of record); 63 Fed. Reg. at 590 (discussing history of eligibility rule in connection with proposed amendment to that rule). By approving an eligibility rule tied to the books-and-records rule, the SEC expressed its judgment that six years represented the proper balance between allowing claims to go forward and requiring them to be brought before they become stale.[8]

3. Interpreting The NASD Code As Requiring Arbitrators To Determine Eligibility Hampers The Dispute Resolution Process

Interpreting the NASD eligibility provision as just another rule to be applied by arbitrators, rather than a contractual limitation on the arbitrators' authority, would have a significant, adverse impact on the vitality of the NASD dispute resolution process as a whole.

Requiring allegedly aggrieved persons to bring their claims to arbitration before they become prejudicially stale has become increasingly important in the years since this Court ruled that securities-related claims are arbitrable. *See Shearson/American Express Inc. v. McMahon*, 482 U.S. 220 (1987); *see also Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989). The number of claims

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[8] Petitioner's admission that "few claims have statutes of limitation as long or greater than six years" (Petitioner's Brief at 15) recognizes that legislatures have deemed periods of less than six years to be adequate limitations on an investor's ability to pursue a securities claim.

submitted to arbitration has more than doubled during that time, from fewer than 3,000 claims submitted to the NASD alone in 1987, to nearly 7,000 claims submitted to the NASD in 2001. *See* NASD, *Securities Regulation in the United States*, at 41-42 (1992) (Five Year Statistical Review, 1987-1992, reflecting claims filed during that period); NASD Dispute Resolution Statistics, *available at* www.nasdadr.com/statictics.asp (reflecting arbitration statistics through year-end 2001 and projected statistics for 2002); *see also* 1992 GAO Report, at 18 (number of cases filed with SROs increased from 830 cases filed in 1980 to 5,332 in 1990).

During that same time, arbitration has grown more complex, and therefore more costly and time-consuming. In order to continue subsidizing the operating costs of arbitration, the NASD raised the fees imposed on all those who are named parties to the arbitration – fees that are not refundable regardless of the outcome of the proceedings. *See* NASD Notice to Members 98-1, 1998 NASD LEXIS 2 (Jan. 1998) (announcing new arbitration process fee to be assessed on members that are parties to arbitration proceedings); *see also* Order Granting Approval to Proposed Rule Change Relating to Fees and Hearing Session Deposits for the Arbitration of Claims by Public Investors, Members and Associated Persons, SEC Exchange Act Release No. 34-41056, 64 Fed. Reg. 10,041 (Mar. 1, 1999). Only claims designated as small claims (claims with less than $25,000 at issue) may be resolved without a hearing; claims exceeding $50,000 must be heard by a panel of three arbitrators. *See* 10 SAC No. 6, at 13 (Mar. 1999). The vast majority of arbitration claims filed with self-regulatory organizations are not small claims cases. *See, e.g.*, 10 SAC No. 8, at 17 (May 1999) (reflecting total and small claims arbitration filings for 1996-1998).

Arbitration has also become more litigious and subject to gamesmanship with the emergence over the past decade of a

"cottage industry" of claimants' law firms specializing in securities arbitration. A nationwide bar association of attorneys "dedicated to the representation of investors in disputes with the securities industry" has emerged, and has established a website through which allegedly aggrieved claimants may search for an attorney who meets "strict membership requirements" to help them pursue their claims. *See, e.g.*, website of Public Investors Arbitration Bar Association website, www.piaba.org/about.asp. (stating that organization was "established . . . as an educational and networking organization for securities arbitration attorneys who represent the public investor in securities disputes"). In connection with proposed amendments to the eligibility rule, the NASD has recognized the "[t]actical maneuvering" that has taken place by parties who "attempt to gain an advantage by filing a claim or a motion in the forum they believe will produce a favorable ruling" on eligibility. 63 Fed. Reg. at 590.

Given the complexity of and rising costs associated with arbitration, it has become increasingly important that contractual limitations on agreements to arbitrate be honored. Allowing courts to determine eligibility reduces the risk of either intentional or de facto non-enforcement by arbitrators. The NASD has noted that attempts to enforce the eligibility provision through arbitration itself "have had mixed success because arbitrators tend to delay eligibility decisions until the hearing on the merits." *Id.* Claimants with stale claims sometimes attempt to circumvent the six-year eligibility bar by casting as "claims" what are in reality impermissible equitable arguments (such as tolling or asserted failure to discover the basis for their claim) to extend the six-year eligibility period. *See, e.g., PaineWebber Inc. v. Hofmann*, 984 F.2d 1372, 1381-82 (3d Cir. 1993). In these instances, a strong temptation exists for the arbitrators to resolve the factual dispute regarding eligibility simultaneously with resolving the factual disputes regarding the substantive merit of the claims.

This tendency to defer a ruling on eligibility until after adjudication of the merits clearly threatens the purpose of the rule, and creates the very risks the eligibility rule was intended to avoid: the risks that broker-dealers and others in the securities industry will be forced to spend time and money arbitrating ineligible stale claims, and that arbitrators would be reluctant to dismiss a claim as ineligible after having heard full arguments and evidence on the merits. These risks interject an impermissible degree of uncertainty into an otherwise clear-cut rule. Determinations regarding eligibility should not be made by arbitrators, who may apply varying standards and whose rulings on eligibility are insulated from effective challenge, unless the parties clearly and unmistakably indicate their desire to arbitrate that critical initial issue.[9]

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[9] This Court's opinion in *First Options* conclusively dispenses with the argument made by *amicus* SEC that courts should not decide questions of eligibility because, notwithstanding the language of the eligibility rule, the parties "likely intended that the arbitrator would decide" whether the claims were timely filed, and that, in any event, allowing courts to make eligibility determinations would make arbitration more costly and less expedient. *See* SEC *Amicus* Brief at 25. As this Court noted in *First Options*, determinations of whether the parties agreed to arbitrate the question of arbitrability do not depend on what the parties "likely intended," but rather hinge on what the parties "clearly and unmistakably" agreed. *See* 514 U.S. at 945. In addition, as this Court also noted, the "basic objective" of arbitration "is not to resolve disputes in the quickest manner possible, no matter what the parties' wishes," but rather "to ensure that commercial arbitration agreements, like other contracts, are enforced according to their terms." *Id.* at 946-47 (internal quotations omitted). Furthermore, the expediency argument advanced by the SEC fails to address the inefficiency of forcing parties who are unable to resolve the eligibility issue through pre-hearing proceedings to arbitrate the substantive merits of stale claims while awaiting the arbitrators' decision regarding eligibility. *See* Section A.3, *supra*.

4. The Principles Underlying The Federal Arbitration Act Are Best Served By Allowing Courts To Determine Eligibility Unless The Parties Clearly And Unmistakably Agree Otherwise

Treating a dispute regarding eligibility as a matter for courts to decide absent "clear and unmistakable" evidence of an intent to arbitrate that question also best serves the purposes of the FAA.

The FAA was enacted in 1925 in order to provide uniformity in enforcing agreements to arbitrate and to place such agreements on equal footing with any other contract. *See, e.g., Equal Employment Opportunity Comm'n v. Waffle House, Inc.*, 534 U.S. 279, 122 S. Ct. 754, 761-62 (2002). To this end, the FAA created a federal body of substantive law governing arbitration, to be applied uniformly regardless of the jurisdiction in which enforcement of an agreement is sought. *See, e.g., Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). The FAA thus represents an important policy decision in favor of enforcing arbitration agreements according to their terms. As noted above, this Court has confirmed that the policy favoring arbitration extends to arbitration of securities-related disputes. *See McMahon, supra*; *Rodriguez de Quijas, supra*.

Implementing that policy requires courts to remain mindful that, as Petitioner acknowledges, "[r]esolution of disputes through arbitration is a matter of agreement" and that "[p]arties are not required to arbitrate unless they have agreed to do so." Petitioner's Brief at 6. Parties who agree to submit disputes to arbitration relinquish substantial rights, including the right to appeal an incorrect decision, the right to have a jury resolve the merits of their action, and, depending on the rules of the forum, the right to have factually or legally baseless claims dismissed through pre-hearing motions. But they relinquish those rights only as to the disputes they contractually agree to arbitrate. Just as parties may

agree to submit certain disputes to arbitration, they may contractually agree that certain other disputes are exempt from arbitration. In Petitioner's words, "arbitrators have authority to resolve disputes only because the parties agreed in advance to submit them to arbitration." Petitioner's Brief at 18.

The FAA therefore includes three separate provisions designed to ensure that arbitration agreements are enforced according to, and only according to, their terms. Two of those provisions empower courts to make pre-arbitration decisions regarding arbitrability. Section 3 requires a court to stay proceedings pending before it "upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration" under a written arbitration agreement. 9 U.S.C. § 3. Similarly, Section 4 requires a court to compel arbitration "in accordance with the terms of the agreement" to arbitrate "upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue." 9 U.S.C. § 4. A third section – Section 10 – empowers courts to make post-arbitration decisions regarding arbitrability and to vacate arbitration awards where the arbitrators "exceeded their powers." 9 U.S.C. § 10. This Court has confirmed that arbitrators "exceed[] their powers" when they attempt to resolve issues the parties never agreed to submit to arbitration. *See First Options*, 514 U.S. at 946-49 (affirming Court of Appeals' reversal of award confirmation on the grounds that the dispute was not arbitrable as against those parties).

This Court's previous rulings underscore that courts play a critical role in determining whether or not parties to an arbitration agreement have agreed to arbitrate particular disputes. In *Moses H. Cone*, for example, one party resisted arbitration by arguing, among other things, that arbitration was barred under a provision of the parties' contract limiting the age of disputes that could be submitted to arbitration. *See* 460 U.S. at 5 n.2. The Court noted that "the basic issue presented" in the federal suit "was the arbitrability of the dis-

pute" (*id.* at 24), and concluded that the Court of Appeals "acted within its authority in deciding the legal issues presented" after reviewing "full briefs and evidentiary submissions from both parties on the merits of arbitrability." *Id.* at 29.

Similarly, the collective bargaining agreement at issue in *AT&T Technologies, Inc.* contained an exclusion limiting the types of disputes that could be submitted to arbitration. This Court ruled that it was up to the court, not the arbitrator, to determine whether or not a particular grievance fell within the scope of that exclusion. 475 U.S. at 651. Were the rule any different, the Court observed, "an arbitrator would not be constrained to resolve only those disputes that the parties have agreed in advance to settle by arbitration, but, instead, would be empowered to impose obligations outside the contract limited only by his understanding and conscience." *Id.* (internal quotation and citation omitted).

Like the provisions at issue in *Moses H. Cone* and *AT&T Technologies*, the NASD eligibility rule operates as a contractual limitation on the scope of disputes the parties agreed to arbitrate. By agreeing to arbitrate before the NASD, the parties agreed to submit to arbitration only those disputes eligible for arbitration under NASD rules. The text of the FAA and this Court's decisions interpreting and applying it confirm that arbitrators ordinarily cannot make threshold determinations of eligibility absent clear and unmistakable evidence that the parties agreed to arbitrate that initial question.[10]

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[10] Petitioner's admission that questions of arbitrability are presumptively for courts to decide (*see* Petitioner's Brief at 27) undermines Petitioner's later assertion (*see id.* at 32) that those who agree to arbitrate "any and all controversies" necessarily must have meant to arbitrate the very question of arbitrability itself.

B. The Court Of Appeals Properly Applied Federal Arbitration Law In Determining That The Parties Had Not "Clearly And Unmistakably" Demonstrated An Intent To Arbitrate Eligibility

Petitioner contends that the Court of Appeals should have followed the ruling of the New York Court of Appeals in *Smith Barney Shearson Inc. v. Sacharow*, 689 N.E.2d 884 (N.Y. 1997) and ruled that the parties "clearly and unmistakably" manifested their intent to arbitrate the question of eligibility under Section 10304. *Amicus* respectfully disagrees.

As the Court noted in *First Options*, ordinary state law principles of contract interpretation are modified by the federal arbitration law principle that parties are not presumed to have agreed to arbitrate arbitrability unless they have "clearly and unmistakably" manifested their intent to do so. *First Options*, 514 U.S. at 944. The question of whether or not particular language constitutes "clear and unmistakable" evidence of an intent to arbitrate eligibility raises a question of federal arbitration law regarding the allocation of power between courts and arbitrators, and therefore must be decided under federal law unless the parties clearly agree otherwise. *See, e.g., Sovak v. Chugai Pharm. Co.*, 280 F.3d 1266, 1270 (9th Cir. 2002) (federal law supplies the rule of decision for determining whether a party waived right to compel arbitration because that question "directly concerns the allocation of power between courts and arbitrators").

Quite simply, *Sacharow*, and the cases upon which it relied, are wrongly decided. The court in *Sacharow* first correctly determined that the NASD eligibility rule raises a threshold question of arbitrability, which cannot be arbitrated absent clear and unmistakable evidence that the parties intended to arbitrate that question. *See* 689 N.E.2d at 886-87 (eligibility rule "limits the subject of, entitlement to, and

range of arbitrable matters" and therefore presents a question of arbitrability).

The court did not, however, apply the proper presumptions in determining whether the parties had clearly and unmistakably manifested an intent to arbitrate the question of eligibility. Applying precedent from the Second Circuit Court of Appeals, the court in *Sacharow* ruled that an agreement to arbitrate "any and all controversies" provides clear and unmistakable evidence of the intent to arbitrate threshold questions of arbitrability as well. *See* 689 N.E.2d at 887-88 (applying *PaineWebber Inc. v. Bybyk*, 81 F.3d 1193 (2d Cir. 1996)). As further purported support for its conclusion, the court pointed to a separate provision of the NASD Code that empowers arbitrators to interpret and apply all other provisions of the NASD Code. *Id.* at 888 (citing NASD Code § 35, now NASD Code § 10324). Petitioner, not surprisingly, makes the same argument here. *See* Petitioner's Brief at 33-35. The *Sacharow* court concluded that this general clause, when coupled with the agreement to arbitrate "any and all controversies," provided clear and unmistakable evidence of the intent to allow arbitrators to make threshold determinations of eligibility.

This flawed reasoning ignores the presumptions established in *First Options*, the purpose of the eligibility provision, and the primacy of the eligibility rule over more general sections of the NASD Code. As noted above, the Court ruled in *First Options* that silence or ambiguity on the question of who decides arbitrability does *not* give rise to a presumption that the parties agreed to arbitrate that threshold question. *First Options*, 514 U.S. at 944-45. Instead, there is a presumption *against* arbitrating the question of arbitrability, unless the parties have clearly and unmistakably agreed otherwise. *Id.*

The arbitration agreement at issue here, like the arbitration agreements in *Bybyk* and *Sacharow*, did not expressly

state who would decide the question of arbitrability. The Court of Appeals in this case properly concluded that by interpreting the "any and all controversies" language as an indication that the parties agreed to arbitrate the threshold question of eligibility, the courts in *Bybyk* and *Sacharow* in effect reversed the presumption against arbitrating arbitrability and created a presumption that the parties *did* agree to arbitrate threshold arbitrability issues unless they expressly carved out eligibility determinations from their arbitration agreements. *See, e.g.*, Pet. App. 24 n.7 ("We believe the *Sacharow* court gave insubstantial weight to the presumption established in *First Options* that parties to arbitration agreements generally intend arbitrability questions to be resolved by the courts."); *see also Bybyk*, 81 F.3d at 1200 ("The parties' broad grant of power to the arbitrators is unqualified by any language carving out substantive eligibility issues (with or without specific reference to timeliness) for resolution by the courts."); *Sacharow*, 689 N.E.2d at 887 (approving of and applying *Bybyk*). That is exactly the opposite of what *First Options* and *AT&T* contemplated.

The Court of Appeals also properly concluded that Section 10324 does not supply the requisite "clear and unmistakable" evidence of the intent to arbitrate eligibility. The general language of Section 10324 cannot trump the more specific language of the eligibility rule. *See, e.g.*, *Cogswell v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 78 F.3d 474, 480 (10th Cir. 1996) ("[I]t is well established under the generally applicable rules governing contract interpretation that specific provisions, like § 15 [predecessor to Section 10304] take precedence over more general provisions, like § 35 [predecessor to Section 10324.]") (citing *Mutual Life Ins. Co. v. Hill.*, 193 U.S. 551, 558 (1904)); *accord Cohen*, *supra*, 62 F.3d at 384. Reading Section 10324 to require arbitration of eligibility disputes ignores the gatekeeping function of the rule, which, as discussed above, was adopted in order to avoid submitting stale claims to arbitrators for any purpose.

Moreover, if a claim is not eligible for submission to the arbitrators under Section 10304, the arbitrators should never have the opportunity to consider the application of any provisions of the NASD Code.

Finally, Petitioner is wrong in asserting that the general choice-of-law clause contained in the parties' agreement somehow required the Court of Appeals to apply New York decisional law on what constitutes "clear and unmistakable" evidence of an intent to arbitrate eligibility. This Court has already ruled that a general choice-of-law provision does not signify an intent to be bound by New York arbitration law.

The parties in *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995) agreed that "any controversy" arising out of the transactions between them would be resolved by arbitration in accordance with the rules of the NASD, or the Boards of Directors of the New York Stock Exchange or the American Stock Exchange. *Id.* at 59. The parties further provided that the entire agreement "shall be governed by the laws of the State of New York." *Id.* at 58-59. At the conclusion of the arbitration, which proceeded before the NASD under NASD rules, the arbitrators entered an award which included punitive damages. Shearson challenged that award on the grounds that New York law precluded arbitrators from awarding punitive damages. *Id.* at 54-55.

This Court flatly rejected the contention that the general choice-of-law provision signified the parties' intent to incorporate "New York law relating to arbitration." *Id.* at 62 (quotation marks omitted). Instead, the Court reasoned, the "best way to harmonize the choice-of-law provision with the arbitration provision" was to read the choice-of-law provision to cover the substantive "rights and duties of the parties" with respect to their commercial relationship, and the arbitration clause as governing arbitration. *Id.* at 63-64.

The decision in *Mastrobuono* thus emphasizes a principle established years earlier: that the FAA created a federal body

of substantive law governing arbitration, to be applied uniformly regardless of the jurisdiction in which enforcement of an agreement is sought. *See, e.g., Moses H. Cone*, 460 U.S. at 24. Because the FAA did not create federal question jurisdiction to enforce arbitration agreements falling within its scope, state courts often must decide whether or not to stay proceedings or compel arbitration pursuant to the FAA. In doing so, however, state courts are enforcing *federal* law, and must apply *federal* standards under the FAA. *See id.*; *see also id.* at n.32 ("[A]lthough enforcement of the Act is left in large part to the state courts, it nevertheless represents federal policy to be vindicated by the federal courts where otherwise appropriate.").[11]

The Court of Appeals therefore properly ruled that the parties' general choice-of-law provision did not require the federal district court to adhere to a New York state court application of the federal law test of whether or not the parties agreed to arbitrate the threshold question of arbitrability. *See* Pet. App. at 23-24 ("On the arbitrability issue before us, then,

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[11] Of course, parties to an arbitration agreement remain free to agree to be bound by state law rules of arbitration. *See Volt Info. Scis., Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468 (1989). The critical issue is whether the parties did, in fact, clearly agree to be bound by those state law arbitration rules, including state court decisions regarding what constitutes "clear and unmistakable" evidence of an intent to arbitrate the question of arbitrability. In resolving this question, the "strong default presumption is that the FAA, not state law, supplies the rules for arbitration." *Sovak*, 280 F.3d at 1269-70 (citing cases and concluding that general choice-of-law clause incorporated federal rules for arbitration but state substantive law); *see also Roadway Package Sys., Inc v. Kayser*, 257 F.3d 287, 288-89 (3d Cir.), *cert. denied*, 122 S. Ct. 545 (2001) (holding that a "generic choice-of-law clause" did not signify intent to apply state law standards governing whether arbitrator exceeded the scope of his authority).

we are not governed by how the New York Court of Appeals construed similar arbitrability language, but are governed instead by the federal law of arbitrability . . . .")

Consistent application of a federal law standard is extremely important to the securities industry. Self-regulatory organizations preside over thousands of arbitrations relating to national securities marketplaces involving companies doing business nationwide. The NASD, New York Stock Exchange, and American Stock Exchange each have an eligibility provision governing access to their arbitration fora. Determinations of whether or not parties agreed to arbitrate the question of eligibility must be made according to a single, consistent federal standard of "clear and unmistakable evidence," regardless of generic choice-of-law clauses governing the parties' underlying substantive rights and obligations.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted.

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No. 01-800

IN THE

Supreme Court of the United States

OCTOBER TERM, 2002

KAREN HOWSAM,

Petitioner,

v.

DEAN WITTER REYNOLDS, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* FOR THE COMPETITIVE ENTERPRISE INSTITUTE IN SUPPORT OF RESPONDENT

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MOTION OF THE COMPETITIVE ENTERPRISE INSTITUTE FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN SUPPORT OF RESPONDENT DEAN WITTER REYNOLDS[1]

The Competitive Enterprise Institute (CEI) respectfully moves this Court for leave to file the accompanying brief amicus curiae in support of respondent Dean Witter Reynolds. Consent to the filing of this brief has been received from respondent Dean Witter Reynolds (and is filed with the Clerk of this Court). However, by the time of filing we have not received a reply in response to our requests for consent from petitioner Karen Howsam.

The Competitive Enterprise Institute's interest in this case stems from the work of our scholars on the impact of regulation and litigation on the legal institution of contract.[2] The Competitive Enterprise Institute is a nonpartisan policy analysis organization founded in 1984, dedicated to the principles of limited constitutional government and free enterprise. CEI has an interest in supporting the position of the respondent, to urge that this Court enforce the intent of the parties to a contract as expressed in the plain meaning of the contract itself and the rules governing the contract. While the parties have briefed the more technical aspects of this

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[1] Pursuant to Supreme Court Rule 37.6, *Amicus Curiae* states that no counsel for any party to this dispute authored this brief in whole or in part and no person or entity other than *Amicus Curiae* made a monetary contribution to the preparation or submission of this brief.

[2] *See, e.g.,* Comments at FTC hearing on Consumer Privacy, Julie DeFalco, July 28, 1997, at http://www.cei.org/gencon/027,01503.cfm (accessed July 16, 2002); Clyde Wayne Crews, *Antitrust Policy As Corporate Welfare,* July 1, 1997, at http://www.cei.org/gencon/025,01615.cfm (accessed July 16, 2002); Donald J. Boudreaux and Andrew N. Kleit, *How the Market Self-Polices Against Predatory Pricing*, June 1, 1996, at http://www.cei.org/gencon/025,01470.cfm (accessed July 16, 2002).

case concerning arbitration clauses, we hope that our analysis will be of help to this Court in assessing some of the broader issues the case presents concerning the interpretation of contracts.

For this reason, CEI's motion for leave to file the attached amicus brief should be granted.

Respectfully submitted,

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QUESTION PRESENTED

Whether arbitration contracts should be interpreted according to their terms.

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STATEMENT OF INTEREST OF AMICUS CURIAE

The interest of the Competitive Enterprise Institute in this case is set out in the previous motion for leave to file this amicus brief.

SUMMARY OF ARGUMENT

This case presents the question of whether the application of a time limit on the arbitrability of a dispute is the province of the arbitrator, or whether a court may apply the limit. The time limit in question is an NASD rule, incorporated in the contract between petitioner Karen Howsam and respondent Dean Witter.

We urge the Court to resolve this dispute over the meaning of a contract providing for arbitration primarily by looking to the text of the contract and the rules incorporated into it for guidance, as these parties must have, and as other parties to other similar contracts will in the future.

In the first part of our argument, we review this Court's precedents on the interpretation of arbitration contracts, which explain that the Federal Arbitration Act (FAA) was not intended to displace focus on the intent of the parties to the contract by federal statutory policy. Rather, the FAA set arbitration contracts on the same footing as other contracts. We then offer a broad perspective on the mutual benefits of contract for both contracting parties. We conclude by examining standardized contracts, sometimes called "form contracts," of the type often at issue in arbitration cases such as this one.

In the second part of our argument, we look more closely at the contested contractual and regulatory text in this case. This Court has in the past looked first and foremost to the text of arbitration contracts to resolve arbitrability disputes; in this instance, that approach should result in a ruling in favor of respondent.

ARGUMENT

THE COURT SHOULD LOOK TO THE TEXT OF THE CONTRACT TO DETERMINE THE INTENT OF THE PARTIES TO THE CONTRACT.

Viewed narrowly, this case presents the Court with the question of whether the time limitation provision of an arbitration clause is to be applied by an arbitrator or by a judge. But this case also raises larger issues of the courts' approach to the interpretation of securities arbitration contracts and, indeed, contracts in general. In the last century, some jurists anticipated the death of contract, brought about by the expansion of the law of tort.[3] This case presents the Court with an opportunity to clarify that its precedents do not require that contract be drowned in a sea of policies and presumptions divorced from the intentions of the contracting parties.

A. Contracts Benefit Both Parties: The Present Agreement Is No Exception

Respect for private parties' authority to enter into voluntary agreements motivated the passage of the Federal Arbitration Act. The Act was intended to counteract judicial decisions that disfavored arbitration and to place arbitration agreements on the same ground as other contracts. H.R. Rep. No. 96, 68th Cong., 1st Sess., 1 (1924). Consistent with this respect for the intentions of the contracting parties as embodied in their contract, this Court's precedents make it clear that, in arbitration contracts, it is the parties' intentions, not statutory or judicial policies, that govern. As the Court has explained, "the FAA's proarbitration policy does not operate without regard to the wishes of the contracting parties." *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995). The FAA thus directs courts "to place

[3] *See* G. Gilmore, *The Death of Contract* 97-94 (1974).

arbitration agreements on equal footing with other contracts," but it "does not require parties to arbitrate when they have not agreed to do so." *E.E.O.C. v. Waffle House, Inc.*, 122 S. Ct. 754, 764 (2002), citing *Volt Information Sciences, Inc. v. Board of Trustees of Leland Standard Junior Univ.*, 489 U.S. 468, 478 (1989). Simply put, "this Court will not override the clear intent of the parties, or reach a result inconsistent with the plain text of the contract, simply because the policy favoring arbitration is implicated." *Waffle House*, 122 S. Ct. at 764.

The FAA's focus on honoring the parties' intent benefits *everyone* who enters into an arbitration contract. Contract law is a remarkable institution. It empowers almost anyone to reduce future uncertainties by creating a relationship with a stranger governed by detailed rules suited to the parties' own unique circumstances. It is an axiom of economics that both parties to a contract benefit from the relationship; otherwise, they would not have agreed to it. Each party has promised the other something that he lacked beforehand; hence, upon agreeing, each party becomes better off. These trades raise societal standards of living as a whole.[4] They

[4] Professor Michael Krauss explains:

> Contract law, to paraphrase a classic liberal paradigm, arises from man's realization that natural liberty, if unaccompanied by binding cooperation, will result in a self-sufficient life that is "solitary, poor, nasty, brutish and short." From this realization springs the deep and meaningful paradox that liberty is most meaningfully implemented when it is voluntarily traded away. Though man may not alienate his freedom entirely, he can and indeed must parcel bits of it off if he wishes to participate in a social life. By doing this, of course, he produces consumer surplus that results in wealth for his fellows while at the same time receiving from the latter more than he gives up—according to his own, freely determined function of values.

regularize relations between strangers, otherwise governed only by the bare vagaries of tort or statutory rules crafted by others.[5] Contracting enables ordinary workers to trade their work for wages and ultimately for dazzling arrays of commercial goods and services. The fundamental importance of contract to society is recognized and embodied in the Constitution's Contracts Clause, one of the few clauses from the founding era that applies directly to the states.[6]

Widespread personal freedom to enter binding agreements arose under the common law at the end of the eighteenth century. Judges began to cast aside paternalistic medieval legal concepts "protecting" certain categories of persons such as seamen by preventing them from entering into certain types of contracts, instead recognizing the mutual benefits of contract.[7] This tectonic shift in legal perspective from "status" to "contract" had broad implications for personal freedom and social advancement, as Sir Henry Maine noted long ago.[8] It is ironic that this freedom is still threatened today, often in the name of

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Michael I. Krauss, *Tort Law and Private Ordering*, 35 St. Louis U. L.J. 623, 625-626 (1991).

[5] See Walter Olson, *Tortification of Contract Law: Displacing Consent and Agreement*, 77 Cornell L. Rev. 1043 (July, 1992) ("Tort law is modeled on the one-sided, gratuitous infliction, as when a stranger drives into your front porch and demolishes it. Nothing is pre-arranged or arrangeable; nothing is of mutual benefit...").

[6] "No State shall ... pass any ... Law impairing the Obligation of Contracts...." U.S. Const., Art. 1, § 10, cl. 1.

[7] P. S. Atiyah, "Common Law," *in The New Palgrave: A Dictionary of Economics (The Invisible Hand)* 70, 73-75 (John Eatwell, Murray Milgate, and Peter Newman, eds., 1989).

[8] See H. Maine, *Ancient Law* 165 (Raymond Firth ed., Beacon Press 1963) (1861) ("[W]e may say that the movement of the progressive societies has hitherto been a movement from Status to Contract.").

fairness, but ultimately with similar results to the old paternalism.

Should the legal system deprive certain individuals of the capacity to be able to enter binding agreements, it would do them no favor. Those individuals will soon find the universe of persons willing to contract with them on favorable terms rapidly shrinking. When Roman lawmakers decreed that it was unfair to require women to be bound by their contracts, because it was in women's nature to constantly change their minds, they quickly found merchants refused further dealings with women.[9] In our own country, "married women" statutes depriving women of the right to contract were long a mark of second-class civil status. *See, e.g., Milliken v. Pratt*, 125 Mass. 374 (1878) (seminal case enforcing a married woman's agreement and noting the tendency of modern legislation to "enlarge" women's contracting rights). The "slave codes" offer another notorious example. As Professor Mark Tushnet points out, the framers of the Fourteenth Amendment were well aware of the central importance of granting freed slaves the right to enter binding agreements. In particular, they "thought that freedom of contract was extremely important because it was the foundation of individual achievement."[10] Accordingly, after the civil war, one of the most important rights given to

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[9] Bruno Leoni, *Freedom and the Law* 143 (1972) (describing the enactment of the *Senatus Consultum Velleianum*, noting "People had very little desire to enter into contracts with women after the enactment of the *Senatus Consultum*. A remedy for this inconvenience was finally found by admitting that women could renounce the privilege of the *Senatus Consultum* before engaging in some contracts, such as the sale of land.")

[10] Mark Tushnet, *Following the Rules Laid Down: A Critique of Interpretevism and Neutral Principles*, 96 Harv. L. Rev. 781, 801 (1983).

former slaves was the right to sue and be sued—the right to contract.[11]

Amici Curiae Trial Lawyers for Public Justice and the AARP appear to recognize these fundamental points on one level, because they argue that the parties' intentions should not be set aside in considering arbitration obligations. But they then imply that clauses concerning arbitrability should be viewed as imposed or coerced simply because a consumer or worker has signed a largely standardized contract. This argument has no application to this case because Petitioner Howsam has not hinted or alleged that this was a "contract of adhesion," or that any element of coercion or fraud entered into its making.[12]

More fundamentally, standardized contracts are beneficial for consumers, not harmful; they certainly are not inherently coercive. Standardized contracts (also called "form contracts") have emerged in the marketplace because similarly situated customers have similar needs. And all customers value their time; hardly anyone would wish to renegotiate individual items in a complex commercial contract. Nor is there need for customers to do so to protect their interests. Competition between employers for workers

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[11] Enforcement (Klu Klux Klan) Act of 1871, 17 Stat. 13 (1871). The Act is now codified at 42 U.S.C. § 1981 ("All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue…").

[12]Furthermore, the theory that inequalities of bargaining power alone result in a form of "coercion" is invalid. It is coercion when a mugger points a gun at you and says, "your money or your life." When you hand over your money, you have received no benefit from the mugger; his power to take your life should not be confused with a new benefit that he confers upon you by refraining from taking it. It was never his to give. By contrast, *every* contract confers benefits on both parties. The view that arbitration clauses are "imposed" on consumers therefore has no more validity than arguing that Safeway robs us because we cannot haggle down the price of an apple.

and between businesses for customers ensures that, over time, businesses offer more favorable deals. Theories that mindlessly stigmatize standardized contracts as "contracts of adhesion" critically underestimate the fact that competition benefits consumers and employees with respect to prices paid, quality, service, and other terms. As a general rule, standardized contracts, like standardized goods, benefit consumers.

B. This Court Should Look to the Text of the Contract and the NASD Rules as Guide to the Parties' Intent

In the previous section we set out reasons this Court should affirm its rulings giving dispositive attention to the intentions of the contracting parties in cases involving arbitration clauses. Here we explain why the text of the arbitration contract at issue in this case, together with the governing NASD rules, are once again the Court's best guide.

At issue in this case is the impact of two provisions of the NASD Code of Arbitration on the arbitration clause of a contract for the sale of securities. The contract signed by petitioner Karen Howsamm contained an arbitration clause. Under that clause, when a dispute arose under the contract, petitioner Howsam elected to arbitrate before the NASD. Section 10304 of the NASD rules, "Time Limitation Upon Submission," provides, in relevant part, that "No dispute, claim, or controversy shall be eligible for submission to arbitration under this Code when six (6) years have elapsed from the occurrence or event giving rise to the act or dispute . . ." In addition, section 10324 of the rules, "Interpretation of Provisions of Code and Enforcement of Arbitrator Rulings," provides in relevant part that "The arbitrator shall be empowered to interpret and determine the applicability of all provisions under this Code and to take appropriate action to obtain compliance with any rulings by the arbitrator(s)…"

Petitioner Howsam's claims, stemming from the sale of securities in 1992, might be time barred under these provisions. This case will determine whether, under the rules, a court or the arbitrator should decide whether a time bar applies. Both parties agree that the NASD rules should be incorporated into the contract for purposes of interpreting its meaning. As explained above, when a contract providing for arbitration is clear, the Court has consistently looked to the language of the agreement, not to statutory policies or judicial presumptions, to resolve questions of interpretation. *See* pages 2-3, above.

In contrast with this case law, petitioner's brief and the brief of the SEC put forward countless judicial and statutory policies and presumptions before ever reaching the language of the agreement. The first of these rules of thumb is what petitioner misdescribes as a "strong federal policy in favor of arbitration, applicable in both state and federal courts." Brief for the Petitioner, at 10. But this Court has made it clear that the FAA "confers only the right to obtain an order directing that "arbitration proceed *in the manner provided for in [the parties'] agreement.*" *Volt*, 489 U.S. at 469 (citing 9 U.S.C. § 4, emphasis added by *Volt* Court). It far overstates the case to think of the FAA as "favoring" arbitration. Rather, as noted above, the FAA was designed to counteract judicial decisions that *dis*favored arbitration and to place arbitration agreements on the same ground as other contracts. *See* page 2 above. The text and history of the FAA thus provide no grounds for displacing an inquiry into the clear language of the contract and the interpretive rules governing it.

To be sure, the arbitration clause in this case is a general one, referring all disputes to the arbitrator. But this general provision should be read in light of the fact that *all* the potential arbitration forums contain time limitation provisions. *See* Brief for the Petitioner, p. 11. It thus seems *un*reasonable to interpret the general arbitration clause to mean that time-barred claims or the issue of their

arbitrability are to be referred to the arbitrator. The contract at issue here, like other contracts, should be interpreted in light of commercial custom. *See, e.g., Pennzoil Co. v. FERC*, 645 F.2d 360, 388 (5th Cir. 1981); *United Van Lines, Inc. v. United States*, 448 F.2d 1190, 1195 (D.C. Cir. 1971).

The SEC's brief notes that courts have ruled that, in general, time limits in arbitration clauses *outside* of the securities area are for the arbitrator to apply. *See* Brief for the SEC, p. 23. The fact that the courts have *not* agreed about securities time limitation rules, however, should be a red flag that there is something particular about the rules' customary wording in the securities context. *See, e.g., PaineWebber Incorporated v. Hartmann*, 921 F.2d 507 (3d Cir. 1990) (considering Rule 603 of the New York Stock Exchange Department of Arbitration, providing that no dispute over six years old "shall be eligible for submission to arbitration"). The NASD time limitation rule says, in simple terms, that claims over six years old are not "eligible for submission to arbitration." This language is perfectly clear and precise, far more so than the general wording of Section 10324, a generic empowering clause. When the two rules are read together, they are best reconciled by taking the view that Section 10324 only comes into play when the arbitrator's authority has been properly invoked—that is, when a claim is *not* time barred. Consistent with her contract and the NASD rules as a whole, it is hard to see how any aspect of the dispute over petitioner Howsam's claims can be submitted to the arbitrator, given that Howsam does not present any colorable argument that her claims are less than six years old.

The SEC contends at length that the time limitation rule might have been worded differently. Brief for the SEC, p. 25. This is significant. Why should the SEC argue this point, if the wording of the rules cuts in its favor? In any case, the more important fact is that the time limitation rule was *not* worded differently. The plain language of the rules as

promulgated should be enforced, as this Court has repeatedly emphasized, for it is that language that gives the parties the only firm indication as to their duties.

Petitioner's additional policy arguments only confirm that contracts should be interpreted according to the parties' expressed intent. Paragraph after paragraph of the briefs for petitioner is devoted, for example, to attempting to show that a time limitation is more "procedural" than "substantive" and should therefore be left for the arbitrator. *See, e.g.,* Brief for the SEC, 13-16. This inquiry is far from persuasive. Indeed, it is nearly incoherent to argue that a time limitation provision does not determine what "subject matter" is arbitrable. The time limitation rule pertains to the time the claim arose, specifically to the problem of the documentation and other evidence available (or not) in support of that claim after six years has passed. If a claim is stale, that is a feature of the claim itself, not a problem relating to some incidental process of the court.

The SEC justifies its desire to exclude time limits from the category of "arbitrability issues" on the ground that it is necessary to minimize "mini-trials" before the main arbitration. But this concern over mini-trials seems misplaced. First of all, the parties may avoid it by changing the language of the contract (especially if they may rely on courts to look first and foremost to the language of the contract). Second, the specter of mini-trials over the issue of whether a given limitation in an arbitration agreement is "substantive" or "procedural" seems just as great as the specter of mini-trials over arbitrability. And the question of arbitrability is at least one that might have some kind of sensible answer, whereas the "substance" versus "procedure" debate is arcane and often bizarre. Finally, is the specter of mini-trials on arbitrability really more worrisome than the specter of parties being dragged before an arbitrator contrary to their expectations and expressed intentions?

Categorizations of rules as "substantive" or "procedural" should not lead one to lose sight of the language of the contract in question and the rules governing it. In this case, the wording of the rules is such that, even if a time limitation is thought of as more "procedural" than "substantive," there is no evidence that the parties intended to bring the arbitrability of timeliness issues before the arbitrators. As always, the plain meaning of the contract and the rules governing it should be the ultimate guide.

CONCLUSION

This Court should uphold its precedents honoring the contracting parties' intentions and affirm the judgment of the Court of Appeals.

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